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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 79-5175

RANDALL DALE ADAMS,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE TEXAS COURT OF CRIMINAL APPEALS

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RANDALL DALE ADAMS

v.

THE STATE OF TEXAS

PETITION FOR WRIT OF CERTIORARI TO

THE TEXAS COURT OF CRIMINAL APPEALS

Randall Dale Adams, petitioner, prays that a writ of certiorari issue to review the order of the Texas court of criminal appeals affirming his conviction for capital murder and the imposition of the death penalty therefor on March 21, 1979.

OPINION BELOW

The opinion of the court of criminal appeals is reported at 577 S.W.2d 717, and is appended hereto as Appendix A.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3). This petition is timely filed pursuant to the order signed by Mr. Justice Powell on June 12, 1979.

QUESTIONS PRESENTED

1. Whether the exclusion from jury service of prospective jurors pursuant to TEX. PENAL CODE ANN. §12.31(b) (Vernon 1974) violated the holding in Witherspoon v. Illinois, 391 U.S. 510 (1968).

2. Whether, under the Texas statutory capital punishment scheme, psychiatric testimony constitutes competent evidence upon which to predicate the imposition of the death penalty, consistent with the Due Process Clause and Addington v. Texas, 99 S.Ct. 1804 (1979), and the Eighth Amendment.

3. Whether the prosecution's deliberate misrepresentation as to the existence of favorable evidence and the prosecution's failure to disclose favorable to the petitioner violated his rights as construed and applied in Brady v. Maryland, 373 U.S. 83 (1963).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . and to have the Assistance of Counsel for his defence.

The Eighth Amendment to the United States Constitution provides:

> [C]ruel and unusual punishments [shall not be] inflicted.

The Fourteenth Amendment provides:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

Court of Proceedings Below

The petitioner was indicted by the Dallas County Grand Jury for capital murder. Specifically, he was charged with the murder of a Dallas police officer. The petitioner plead not guilty. A jury found him guilty and, at the punishment phase of the trial, answered the three statutory punishment questions in the affirmative resulting in the imposition of the death penalty.

Dallas police officer Robert Wood was fatally shot by the driver of an automobile who he had stopped for a traffic violation. David Harris testified that he had stolen the car in which he and the petitioner were riding when Wood stopped the car, and that the petitioner shot Wood and then drove away. Harris admitted to several crimes which he had committed just prior to Wood's murder. Testimony was also adduced that Harris had stated to third parties that he (Harris) had shot Wood. Wood's partner and three

civilian witnesses (one of whom was Emily Miller) testified that the person who shot Wood bore similarities to the petitioner, but to Harris. The petitioner denied shooting Wood and said he was asleep in a motel room at the time of the shooting.

Facts Relevant to the Questions Presented

The facts relevant to the jury selection issue are discussed in more detail hereafter. Suffice it to say that several prospective jurors were excused by the court, upon the prosecution's motion and over the petitioner's objection, after they had been qualified under Witherspoon because they each stated on at least one occasion that the mandatory penalty of life or death required by Texas law would affect their deliberations on issues of fact in the case.

The facts relevant to the issue concerning the imposition of the death penalty under the Texas statutory scheme where the only evidence to support such penalty is psychiatric testimony are, quite simply, as follows: The only evidence which the prosecution adduced at the punishment phase of the petitioner's trial in support of the affirmative findings of fact required by Texas law to impose the death penalty was the testimony of two psychiatrists who both stated that they examined the petitioner for a brief period of time, that during such examination they evaluated him, and that based on such evaluation they concluded he would probably commit acts of violence in the future and that he thus constituted a threat to society. This was the sole evidentiary basis for the jury's affirmative finding that the petitioner was a threat to society, which affirmative finding directly led to the imposition of the death penalty in this case.

The facts relevant to the issue involving the prosecution's suppression of facts favorable to the petitioner are these: Emily Miller testified for the prosecution and identified the petitioner as the man who she saw shoot Wood. She was cross-examined by the petitioner and then excused from further appearance at the trial. Three days later the petitioner learned

that the prosecutor had in his possession a written statement given to the police well before trial in which she described the man she saw shoot Wood as "a mexican or a very light skinned black man". The record amply shows the petitioner to be white. It was then determined that Mrs. Miller had moved to an unknown address and was unavailable for further cross-examination. The trial court refused to allow the petitioner to introduce Mrs. Miller's pretrial statement into evidence.

The record further shows that prior to trial the petitioner requested that he be furnished with "statements of witnesses", "evidence which does or tends to impeach any of the witnesses for the State", "a list of all documents in the possession of the State concerning this case which the State does not intend to introduce into evidence", and "a list of statements by witnesses which the State does not intend to call to testify". Record on Appeal 33 - 34. At a pretrial hearing the trial court order compliance with the petitioner's request. Id. After jury selection was completed, but before the commencement of testimony, the prosecutor in charge of the case stated under oath that the State had no evidence favorable to the petitioner or inconsistent with the prosecution's theory of the case. Trial Transcript 25.

REASONS FOR GRANTING THE WRIT

I.

A writ of certiorari should be granted to determine whether the exclusion from jury service of prospective jurors violated the holding in Witherspoon v. Illinois, 391 U.S. 510 (1968). During the jury selection proceedings in this case, several jurors were excluded from jury service because they stated they could not take a special oath prescribed by Texas law in capital offenses even though the jurors were not irrevocably committed, prior to trial, to vote against the penalty of death regardless of the facts and circumstances that might emerge during the trial.

In response to the 1972 death penalty cases[1] the Texas legislature enacted a capital punishment scheme calling for a bifurcated trial on the issues of guilt/innocence and punishment. 1973 Tex.Gen.Laws, ch. 426, at pp. 1124-29. Under this law, if an accused is found guilty of capital murder, the jury's sole function at the punishment phase of the trial is to answer three statutorily prescribed questions. An affirmative answer to all three questions automatically results in the imposition of the death penalty; a negative answer to any one of the questions results in a life sentence.

Contained in this statutory capital punishment scheme is the following provision:

> Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

TEX.PENAL CODE ANN. §12.31(b)(Vernon 1974). Pursuant to this provision Texas prosecutors have been permitted to advise prospective jurors in capital cases of the effect of the answers to the three punishment questions, and then to require them to state under oath that the mandatory penalty of death or imprisonment for life will not affect their deliberation on any issue of fact. If a prospective juror refuses to make such statement, he is subject to being excused for cause upon the prosecution's motion.

[1] Furman v. Georgia, 408 U.S. 238 (1972).

During the voir dire examination in this case at least nine prospective jurors were excused by the trial court upon the prosecution's motion that they were not qualified under section 12.31(b), even though each of the prospective jurors had been qualified under the Witherspoon standards. On appeal of this case the Texas Court of Criminal Appeals said:

> [Petitioner] contends that by permitting the application of Sec. 12.31(b), supra, to the three punishment issues specified by Art. 37.071, V.A.C.C.P., the trial court bestowed upon the prosecution a broader basis of exclusion than that allowed under the rule of Witherspoon v. Illinois, [supra]. However, this Court has consistently held that the statutory scheme for the selection of jurors in capital cases in Texas, and in particular the application of Sec. 12.31(b), supra, comports with the constitutional requirements of Witherspoon.

Adams v. State, supra, at 728.

In Witherspoon this Court held that a venireman may be excused for cause when he is "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. 391 U.S. at 522, n. 21. But, "[i]f the voir dire testimony . . . indicates that veniremen were excluded on any broader basis . . . the death sentence cannot be carried out even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion." Id.

The questioning of nine prospective jurors in this case - Mrs. Mahon, Mr. Jenson, Mrs. Coyle, Mrs. White, Mrs. Williams, Mrs. Andrews, Mr. Giuffrida, Mrs. McDonald and Mrs. Riddle - reflects that each expressed a belief favoring the death penalty; that some could and would assess the death penalty in a proper case if he were a juror while others stated a reluctance to vote for the death penalty; and that each stated on at least one occasion that the mandatory life or death sentence would affect his or her deliberation on issues of fact. Mrs. Mahon, Mr. Jenson and

Mrs. Coyle testified that they favored the death penalty and would, as jurors, vote for the death penalty in a proper case. Transcription of Court Reporter's Notes of Voir Dire Examination [hereafter "Tr. Voir Dire"] pp. 33 - 37, 351 - 57, 1023 - 25. Mrs. White, Mrs. Andrews, Mr. Giuffrida and Mrs. Riddle all expressed the view that they believed in capital punishment, but that they would find it difficult to vote in favor of the death penalty as a juror. TR. Voir Dire 1530, 2697, 2719, 4448, 4922. Mr. Williams was equivocal in his views about the death penalty, but was not automatically committed, prior to trial, to vote against the imposition of the death penalty. Tr. Voir Dire 2576 - 86. Mrs. McDonald said she did not believe in capital punishment, but stated that in an appropriate situation she could, as a juror, vote in favor of the death penalty. Tr. Voir Dire 4497. Each of the nine prospective jurors was qualified under Witherspoon to serve on the petitioner's jury. Yet, because each of them stated on at least one occasion that the mandatory punishment of life or death would affect his or her deliberation on an issue of fact, the trial court excused them at the prosecution's insistence, and over the petitioner's objection. And, significantly, of these nine, most were equivocal when asked about the effect of the mandatory punishment upon their deliberations and at least five of them - Mrs. Mahon, Mrs. Coyle, Mrs. White, Mr. Williams and Mrs. McDonald - said they could and would set aside their personal feelings and answer the three punishment questions based on the facts, without regard to the punishment that might be imposed as a consequence of thier answers. Tr. Voir Dire 65, 1059, 1548, 2601 - 02, 4543, 4553.

Recently, in Burns v. Estelle, 592 F. 2d 1297 (5th Cir. 1979), the court of appeals held that the exclusion of prospective jurors in a capital case in Texas upon the ground that they would not make the statement required by section 12.31 (b) violated Witherspoon and required a reversal of the death sentence imposed in that case. The court said in Burns that a prospective juror's statement that the mandatory penalty of death or life

would 'affect' his deliberations on any issue of fact in the case is not sufficiently unbending to meet Witherspoon standards. Id, at 1301.

> "[T]he mere reply by [the prospective juror] that the potential penalty would "affect" her is insufficient to permit her disqualification. Such an ambiguous answer spans the range of possible effects on her from a mere heightening of the seriousness with which she might approach her deliberations as a juror, through conscientious and moral dilemma foreseen, to an utter refusal to deliberate rationally at all. More than this was required for her disqualification . . .

Id, at 1301.

In the case sub judice, unlike the situation in Burns, points out the error complained of more clearly because here the prospective jurors who were excused under section 12.31 (b) qualified under Witherspoon by virtue of their testimony that they believed in the death penalty and that they could and would vote it as jurors. In Burns, the prospective jurors expressed opinions that they did not believe in capital punishment. This state of the record, coupled with a close reading of the prospective jurors' testimony in this case, leads to the conclusion that the testimony of the prospective jurors' regarding their inability to make the section 12.31 (b) statement indicated only that the jurors were expressing a "heightening of the seriousness with which [they] might approach [their] deliberations as juror[s]" and not "an utter refusal to deliberate rationally". For example, Mrs. Coyle said she could set aside whatever personal feelings she had about the mandatory punishment involved and answer the three punishment questions without being affected by the mandatory punishment. Tr. Voir Dire 1059. Mrs. White, Mr. Williams and Mrs. McDonald expressed feelings similar to Mrs. Coyle's. Tr. Voir Dire 1548, 2601 - 02, 4543, 4553.

To the extent that section 12.31 (b) authorizes the excusing from jury service of persons who are not, prior to trial, irrevocably committed to vote against the death penalty, the Texas statute creates an impermissibly broader-than-Witherspoon basis for excluding jurors in a capital case because of their feelings about the infliction of capital punishment. Burns v. Estelle, supra, at 1301. Application of that statute in this case denied

the petitioner his rights secured under Witherspoon.

A writ of certiorari should be granted to enforce the Burns decision in this case because Burns represents the correct approach to resolving the conflict between Witherspoon and application of section 12.31(b), as it was applied in this case.

II.

This Court should issue a writ of certiorari to review the death sentence imposed in this case because there is no competent legal evidence supporting the death sentence, as is required under Texas law.

One of the three punishment questions enacted by the Texas legislature in 1973 was whether there is a probability the accused would commit acts of violence in the future. TEX.PENAL CODE ANN. §37.071(b)(2)(Vernon 1979). Under Texas decisional law, there must be sufficient evidence to support a "yes" finding by the jury. The absence of sufficient evidence to support an affirmative answer to such special issue requires a reversal of the death penalty. Warren v. State, 562 S.W.2d 474 (Tex. Crim. App. 1978).

In this case the only evidence which the State adduced to support an affirmative finding to the special issue regarding the probability of the petitioner committing an act of violence in the future was the testimony of two psychiatrists who, after briefly examining the petitioner, testified that on the basis of their examinations they felt that there was a probability he would commit acts of violence in the future.

The court of criminal appeals noted that the petitioner's only prior criminal conviction was for driving an automobile while intoxicated, and noted further that he had been absent without leave while in the Army. However, the court held that "[the psychiatrist's] testimony, when considered with the evidence of the crime itself, which was a particularly senseless and motiveless killing, is sufficient to support the jury's

determination that [the petitioner] would constitute a continuing threat to society." Adams v. State, 577 S.W.2d 717, 730.

Since the decision in Adams, this Court has declared psychiatric diagnoses to be to uncertain to constitute legally binding evidence in situations where the reasonable doubt standard is applicable. Addington v. Texas, 99 S.Ct. 1804, 1812 (1979). Professor Dix reaches just that conclusion in his approach to the use of psychiatric testimony to support affirmative findings on the special issue used in the Texas captial punishment scheme. Dix, The Death Penalty, "Dangerousness, Psychiatric Testimony, and Professional Ethics, 5 Am.J.Crim.L. 151 (1977). If the "uncertainties of psychitric diagnosis" pose an unreasonable barrier in a civil commitment case so that a reasonable doubt standard may not be constitutionally required in such cases, it follows that where the reasonable doubt standard is constitutionally required (as in the punishment phase of Texas capital punishment cases) those same 'uncertainties' must be given equal weight. The inevitable conclusion is that psychiatric testimony cannot be legally competent evidence sufficient to support a jury's affirmative finding that a person will probably commit acts of violence in the future and thus be a threat to society, all of which leads to the imposition of the death penalty in Texas.

In view of this Court's correct and proper recognition of the "uncertainties of psychiatric diagnosis", the issuance of a writ of certiorari is most appropriate in this case to resolve the conflict between Addington and the holding of the court of criminal appeals that psychiatric diagnosis is, by and of itself, a sufficient basis upon which the State may take the life of a citizen as punishment for criminal acts.

III.

A writ of certiorari should be granted to review the decision of the court of criminal appeals in this case regarding the failure of the prosecutor to reveal to the petitioner's counsel the existence of material

within his knowledge which was highly favorable to the petitioner.

Prior to trial, pursuant to the petitioner's motion for the disclosure of favorable evidence, the prosecutor in charge of this case testified that he had no evidence in his possession or within his knowledge that "would go to show the innocence of this Defendant", that "would be inconsistent with [the prosecution's] theory of the Defendant's guilt", or that "would go to exculpate the Defendant". Transcript of Trial Proceedings [hereafter "Tr. Trial"] 25. It was later established that the prosecutor had a statement made by Emily Miller, a prosecution witness who identified the petitioner as the person who shot and killed the deceased, that the person who she saw shoot the deceased was "either a mexican or a light skinned blackman". Defendant's Exhibit No. 17. Since the petitioner is white, Mrs. Miller's statement was supportive of the petitioner's lone defense that he was mistakenly identified. Tr. Trial 64, 343, 1406; State's Exhibit Nos. 5, 5A, 18, 20A, 21, 24.

The petitioner advanced his claim before the court of criminal appeals that the prosecutor's action in withholding Mrs. Miller's statement, which was inconsistent with her trial testimony, violated Brady v. Maryland, 373 U.S. 83 (1963), and its progeny. The court responded that the Texas procedure requiring disclosure of such material at trial rather than prior to trial satisfies the due process requirement of Brady, and held that the failure of petitioner's counsel to request Mrs. Miller's statement after she testified effectively waived any error involved. Adams v. State, 577 S.W.2d 717, 723 (Tex. Crim. App. 1979). Specifically, the court held that the failure of the prosecutor to reveal the existence of Mrs. Miller's statement prior to trial was not error because he was not required to do so under Texas procedures, and the failure of the petitioner to request Mrs. Miller's statement during the trial, as required by Texas procedure, waived whatever error existed in the prosecutor's failure to divulge the statement in question. Id.

Under Brady it is clear that the petitioner was constitutionally entitled to Mrs. Miller's statement because it was inconsistent with her inculpatory testimony and it was supportive of the petitioner's sole defense of mistaken identification. The court of criminal appeals clouded the issue by the mechanical application of state procedures and has overlooked two critical aspects of the matter: first, the prosecutor's impropriety in testifying at the pretrial hearing that he did not have any exculpatory matters in his possession when the record shows that he did have Mrs. Miller's exculpatory statement in his possession at that time, and, second, that the petitioner's right to Mrs. Miller's statement cannot be circumvented by application of Texas rules of procedure which thwart not only constitutionally secured rights but also the integrity of the fact-finding process.

In United States v. Agurs, 427 U.S. 97 (1976), this Court enumerated three situations where Brady considerations apply. The second situation arises when there is a pretrial request for specific evidence. The failure of the prosecution to properly respond to a specific and relevant request is "seldom, if ever, excusable." Id, at 106. It is just that situation that exists in this case, colored by the prosecution's purposefully misleading statement that favorable evidence did not exist. The prosecutor was in possession of a statement that was exculpatory and critically tested a prosecution witness on the crucial portion of her testimony - her identification of the petitioner as the guilty party. The petitioner's specific pretrial request for just such information was sufficient to invoke his rights under Brady. The prosecution's failure to timely and properly respond to the petitioner's pretrial request violated the holding and spirit of Brady.

The prosecutor's pretrial sworn statement that he did not have any material favorable to the petitioner heightened and aggravated the harm. By advising the petitioner under oath that he had no favorable evidence, he created the atmosphere in which the petitioner's trial counsel failed

to renew his request for Mrs. Miller's statement immediately after she had testified, as is required under Texas procedure. Surely the petitioner's counsel felt the right to rely upon the prosecutor's sworn statement, in response to the trial court's order to produce favorable evidence, that no favorable evidence existed when Mrs. Miller completed her testimony at the trial. Whatever blame the petitioner's trial counsel must bear for not renewing their request for favorable evidence during the trial, it must be laid, at least in some part, at the feet of the prosecutor who deliberately, under oath, misled them as to the non-existence of favorable evidence at the pretrial hearing. The prosecutor's actions of purposefully misleading the petitioner regarding the existence of favorable evidence are violative of the spirit of Brady in the context of this case where the prosecutor was in possession of favorable evidence and deliberately failed to disclose it upon demand and court order, and deliberately stated that no such evidence existed.

Finally, this Court has shown a reluctance to accept the mechanical application of state law and procedure which defeats the ends of justice. Green v. Georgia, 99 S.Ct. 2150 (1979); Chambers v. Mississippi, 410 U.S. 284 (1973). The holding of the court of criminal appeals in this case is a prime example of the application of a state procedure in a highly mechanical fashion that defeats the very essence of a trial. The petitioner made a pretrial request for favorable evidence in a timely and proper manner. The trial court responded by ordering the prosecutor to comply with such request. When the prosecutor stated that no such evidence or matters existed, the petitioner had the right to believe that representation and to act upon it consistent with the holding in Brady. The holding of the court of criminal appeals in this case destroys any right of an accused to believe any representation of a prosecutor respecting court-ordered discovery, and compels attorneys and accused to proceed in Texas courts in the manner of 'trial by ambush' - the very evil which Brady sought to

cure. By requiring the petitioner's to renew a pretrial request for favorable evidence during the trial, in the wake of the prosecutor's representation made prior to trial that no favorable evidence existed, to preserve the error of the prosecution's failure to furnish favorable evidence to the petitioner, the court of criminal appeals has mechanically applied a rule of state procedure to circumvent the clear holding of Brady, and has blessed a prosecutor's deliberate misrepresentation of fact regarding the truth of the crucial part of a witness's testimony. This Court cannot, consistent with Brady, tolerate the lower court's holding in this case.

A writ of certiorari should issue to review the holding of the court of criminal appeals that the petitioner's failure to comply with Texas procedures constitutes a waiver of his rights under Brady given the timely, proper and specific demand for the information that was withheld and given the prosecutor's deliberate misrepresentation respecting the non-existence of facts that constituted favorable evidence to the petitioner.

PRAYER

The petitioner respectfully prays that this Court issue a writ of certiorari to the court of criminal appeals to review this case for the reasons stated above, and that this Court reverse the petitioner's conviction and sentence of death.

Respectfully submitted,

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Supreme Court, U. S.
FILED
JAN 24 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5175

RANDALL DALE ADAMS, PETITIONER

v.

TEXAS

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

PETITION FOR CERTIORARI FILED AUGUST 7, 1979
CERTIORARI GRANTED DECEMBER 10, 1979

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No. F-77-1286-1

THE STATE OF TEXAS v. RANDALL DALE ADAMS	IN THE CRIMINAL DISTRICT COURT NUMBER TWO OF DALLAS COUNTY, TEXAS

Relevant Docket Entries

March 28, 1977	9:15 A.M.—Begin Voir Dire—Panel of 50 qualified as group. 10:15 A.M.—Begin V. dire Individually w/juror #1. Voir Dire continues for four weeks and ..... days. Twelfth juror selected on April ..... 1977.
April 26, 1977	Case called for trial. Both sides announced ready. Jury selected, impaneled and sworn. Defendant arraigned. Indictment read. Plea of NOT GUILTY before the jury. Evidence presented. Jury charged. Arguments of counsel. Jury verdict of GUILTY of Capital Murder.
May 3, 1977	Punishment verdict: Issue I —yes Issue II —yes Issue III—yes

In the Criminal District Court No. 2 of
Dallas County, Texas

No. F-77-1286-1

[Record on Appeal (hereafter "Rec."), page 1A]

TRUE BILL OF INDICTMENT

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS, the Grand Jurors, good and lawful men of the County of Dallas, duly elected, tried, empaneled, sworn and charged to inquire of offenses committed within the body of said Dallas County, upon their oaths do present in and to the Criminal District Court, #2 of Dallas, County, at the January Term, A.D., 1977, that one, RANDALL DALE ADAMS, hereinafter styled Defendant, on or about the 28th day of November in the year of our Lord One Thousand Nine Hundred and seventy-six in the County and State aforesaid, did unlawfully, knowingly, and intentionally cause the death of Robert Wood, an individual, hereinafter called deceased, by shooting the deceased with a pistol and the deceased was a peace officer then and there acting in the lawful discharge of an official duty, namely: a uniformed patrolman conducting a traffic violation investigation, and the Defendant then and there knew that the deceased was a peace officer, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State.

HENRY WADE,
Criminal District Attorney of
Dallas County, Texas.

/s/ CHARLES L. COCKRELL,
Foreman of the Grand Jury.

Filed in the Criminal District Court No. 2 of Dallas County, Texas, on February 21, 1977.

In the Criminal District Court No. 2
of Dallas County, Texas

Individual voir dire examination
of prospective jurors

• • •

[Transcription of voir dire examination (hereafter "VD"), page 31]

MRS. FRANCIS MAHON

[VD 33] [By Assistant district attorney Steve Tokley]:

Q. Now, this is a case that the law refers to as capital murder and by that we mean—we're talking about a situation where the Defendant, if found guilty, will receive either a sentence of death or a sentence of life. Those are the only two possible punishments provided by the law.

In this case, as you already know, the Dallas District Attorneys Office is seeking the death penalty. Let me ask you now, if you will tell us what your feelings are about the death penalty?

A. Well, I'm not real sure, it depends on the circumstances of the case. There are some, I feel that yes, they should have the death penalty but I think that others shouldn't. It depends on the case, on the situation.

Q. All right. I think that certainly is a fair [VD 34] statement. I don't think every murder calls for the death penalty and our law recognizes that, and prescribes a certain number of types of murder cases where the death penalty is involved. One of those is the unlawful killing of a Police Officer while that Officer is in the lawful discharge of his duty.

I'm not talking to you about this case, but if you were to sit in a case of that nature which is recognized by the law as a case that could call for the death penalty if the facts and circumstances called for it, would you be in favor of the death penalty?

A. Since it is a law, yes, I could.

Q. Now, how long have you been in favor of the death penalty in certain types of cases?

A. Well, I think there's always been a need for the death penalty in certain types of cases.

Q. Have you always been in favor of it?

A. Yes.

Q. Now, I want you to understand that when we discuss the death penalty with you, that we're not discussing a mass murder situation. We're discussing a situation where the Defendant, if found guilty, would be found guilty of the taking of one human life, do you understand that?

[VD 35] A. Yes, I do.

Q. Are you saying then that if you were selected to be on the jury and if it was the proper case, that you would be in favor of the death penalty?

A. Yes, if it's the proper case, yes, I think so.

* * *

[VD 60] Q. Now, do you feel like if you were sitting on the jury that you could listen to all the evidence presented in the case if you found the Defendant guilty beyond a reasonable doubt, finding him guilty along with the other members of the jury and could you, if the State proved to you that the proper answers to those three questions, beyond a reasonable doubt, would you answer the three questions yes, knowing that the sentence will then be set out by law to be death?

A. Well, I have no choice but to answer them yes if that's the way I felt and that had been proven, [VD 61] yes.

Q. Now, you understand when you say if that's the way you felt, would you answer them?

A. If that's the way the evidence was or that was—this has to come from me. It just can't come from what I hear. I would have to hear, weigh what I hear, and give it some very serious thought. It's just not something I can say yes I would or I wouldn't.

Q. Yes, I understand that. I understand that. But, understanding I'm not in a position to give you examples.

A. I know you're not.

Q. But let me put you in a situation here and you tell me how you feel.

Let's assume that you listen to the evidence of a case, you were convinced from the evidence as were the other eleven jurors, that the Defendant was guilty, you found him guilty of capital murder. You now know that there's only one of two possible punishments, either the sentence

of death or a sentence of life. You know that you're going to be asked those three questions at the close of the evidence in the Hearing. You listen to all the evidence in the second Hearing. You're convinced from the evidence presented to you in the trial that number one, he did act [VD 62] deliberately. Number two, there is this probability that he will commit future criminal acts of violence, based upon the evidence presented, and number three, you're convinced that he did act unreasonably in killing this victim, the evidence has convinced you of that. Therefore, the proper answers to these three questions would be yes, would it not?

A. At this point, I think yes. I don't know whether I would at a time like that, would weigh the death penalty over life or not. I'm really—I really just don't know.

Q. I'm coming to that in just a minute and I appreciate your candor on it. But are we to the point to where in my hypothetical situation, are we to the point to where you're convinced that the evidence shows that the proper answers to those questions is yes, one, two, three?

A. Yes, I'm to that point.

Q. That's been proven. All right. But let's suppose on the other hand your own personal feelings were, for some reason known only to you, your own personal feelings, were that this man should not get the death penalty?

A. Well, there would have to be something that would give me that feeling, I think.

[VD 63] Q. Well, I don't know that there would be any cause for us to speculate right now but can you see where that might happen?

A. Well, it could happen, you know it could happen.

Q. Then the question is, would you set aside those personal feelings and answer the questions yes based upon the evidence?

A. Well, I would be honest with myself.

Q. Ma'am?

A. I would be honest with myself and I think that's being honest with me, but I would have to answer yes if that was my conviction.

Q. Based upon the evidence?

A. Oh, by all means based upon the evidence.

Q. Well, you mentioned something about the sentence

of death or life, that you didn't know how that would effect you. What did you mean by that?

A. Well, I don't think you would ever really know how that would effect you until it came right down to the—I don't know. Since I know the Judge has a choice—

Q. No, the Judge—that's one he won't make.

A. Well, since I'm controlling the Judge's choice.

[VD 64] THE COURT: In essence, Mrs. Mahon, what Mr. Tokley is saying is that when—if we get to the punishment part, if he's found guilty of capital murder, then you really don't set punishment. You don't say we vote death, we vote life. You answer questions. The law contemplates that you will not—that you will answer those questions without regard to what punishment the answers would bring about.

In other words, if you believe that the evidence shows you beyond a reasonable doubt that all three questions should be answered yes, then you would answer them yes or no depending on the case, without regard to what punishment will result from that.

JUROR MAHON: Well, I think I would have to do that.

THE COURT: Okay.

A. (By Juror Mahon) It might be difficult to disregard.

MR. TOKLEY: Could I pursue that a little bit, Your Honor, that's the area—

THE COURT: Go ahead.

[VD 65] Q. (By Mr. Tokley) Let me tell you what the law says here and you tell me how you honestly feel. Let me again point out, there are no right or wrong answers, but this is very important.

A. I wouldn't know how to give a right or wrong answer.

Q. The law says that a perspective juror is disqualified, is disqualified, from serving on this kind of case unless they unequivocally say under oath, as you now are, that the mandatory sentence of death or life would not effect their deliberations on any issue of facts in the case.

Can you tell us that?

A. Well, I don't think so. I don't think it would effect me in any way. I've never been confronted with this.

Q. I understand.

A. But I don't think it would.

Q. Well, we've got to go a little deeper than that.

A. I know you do. Maybe I'll have to search me a little.

Q. Take a little time, why don't you, if you will do that for a moment. Because the law is very emphatic on that point. It says a juror must [VD 66] unequivocally state, unequivocally state that this mandatory sentence of death or life would not—not don't think so—but would not effect their deliberations on any issue of the facts in the case.

A. Say that again to me.

Q. Let me repeat that. Let me be sure you understand it and I'll take whatever time you feel is necessary.

A. Please, this makes me a little bit nervous.

Q. I can understand.

A. I wish I had a drink of water.

THE COURT: Could we have some water? See if you can find us some water.

JUROR MAHON: That's sure nice. I never did find a fountain in the hall.

MS. JAMES [Defense counsel]: Your Honor, the Counsel would also appreciate a drink of water on our table.

THE COURT: We'll see if we can take care of it. It will probably have to be at the next recess. We'll take care of the jurors now.

A. (By Juror Mahon) Now, would you state that again for me please?

Q. The law says a perspective juror is [VD 67] disqualified from service on this type of case unless they state unequivocally that the mandatory sentence of death or life would not, would not, effect that juror's deliberations on any issue or fact in the case.

Do you understand that?

A. Yes, I understand what you're saying.

Q. Now, again, this is why I say there are no right or wrong answers. There are some persons who can say unequivocally that it would not. There are others who tell us that it would effect their deliberations on these facts and issues. And there are some who tell us they just don't know whether it would or wouldn't and they never can give us any more of a straight answer than that.

A. Of course, I'm not trying to just get on the jury.

Q. I understand.

A. Because I just don't know. I really do not know

whether it would effect me or not when it came right down to it.

Q. Like law?

A. That's right. I'm really not sure.

Q. Well, in other words then—

A. Now, I do believe, if I may take it a little [VD 68] further, I do believe if at that time I can dismiss this other from my thoughts and think only of those questions and nothing else, then it would not effect my feelings. But, if at any time those two decisions came back to my mind—

Q. Yeah.

A. —it could effect me and I really cannot say no, it will not effect me, I'm sorry. I cannot, no.

MR. TOKLEY: We'll challenge juror for cause.

THE COURT: Ms. James?

MS. JAMES: Your Honor, the Defendant objects to the challenging of cause for Francis Mahon on the grounds no showing that she could be unequivocally influenced by her knowledge of the range of punishment, no matter what the facts showed and that there has been no showing she would not follow the Court's instructions and abide by the law and that she would not—there has been no showing that she would not take affirmative action in answering the special issues resulting in the death penalty of a particular type of prosecution in the case at bar, and no showing she would be [VD 69] unequivocally influenced by her knowledge of the range of punishment or that she would not set aside her feelings and vote to impose the punishment of death as a punishment for the offense of capital murder.

For those reasons, the Defendant objects to the State excusing Francis Mahon for cause as a juror in this case.

THE COURT: Let's—Mrs. Mahon, let me see if I understand your answers correctly. Is what you're saying, you cannot give us your unequivocal assurance that the mandatory penalty of death or imprisonment for life will not effect your deliberations on any issue of fact? Now, that's a double negative but that's the way I have to pose the question. You cannot unequivocally assure us that the penalty of death or life will not influence or will not effect your deliberations or an issue of fact, any issue of fact?

JUROR MAHON: Well, if—as I said, if I was thinking of

fact only and I was dealing only with facts, I could answer that yes or no I feel sure.

[VD 70] THE COURT: Well, that's—go ahead.

JUROR MAHON: Based on what I had heard, the facts that were presented. But I did say that I was afraid or I did not know when it came right down to it and if there was any doubt in my mind about one of those questions, that I would not be influenced by life or death. If there was any doubt in my mind about one of those three questions that were asked, then I might have a tendency to say no to one of them if there was a doubt in my mind there. You see what I'm saying?

THE COURT: What you're saying, you cannot give us your assurance that you would not be influenced by the punishment in answering the questions on fact issues.

JUROR MAHON: Well, I'm saying I could be influenced and I think most anyone could be.

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[VD 348] FORREST J. JENSON

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[VD 351] [By Assistant district attorney Winfield Scott]:

But, in light of that, we obviously need to know, as the Judge indicated to you, we need to know what your feelings, your attitudes are about the death penalty. Could you share them with us now?

A. Well, I think I believe in letting the punishment fit the crime. I've never had to decide whether or not somebody lived or died and I don't know if I could or not. I feel like I could if I had to.

Q. Okay. That's why we're talking about it now. In other words—

A. It would have to go beyond all reasonable doubt, I think, before anybody would take it upon themselves to judge someone else. But if so, I feel like I probably could.

Q. All right. Well, that's why we need to cross this bridge right now. And let me ask you, have you—why do you feel the death penalty is proper in certain cases?

A. Well, I'm not—I wouldn't say I'm really for the death penalty, but I do feel that society has to have some deterrent to crime and as a result, probably capital punishment is the only means of deterrent that we have.

[VD 362] Q. (By Mr. Scott) So you're saying it's your personal feelings—in other words, you would answer the questions regardless of whether you personally felt he should not die?

A. Well granted, I think I would probably let my conscious kind of be a guide all the time through the trial while you're weighing all the evidence.

Q. Right.

A. But when it got down to the end, you would—you got to make a decision, will it be yes or no, it can't be both.

Q. Well, would you answer the questions yes, yes, yes, if you thought those were the proper answers and knowing that that's going to result in his death, even though you thought he should not have to die for what he did or would your feelings force you in good conscious to answer one no to save it? Like you think he ought to be saved?

A. Well, if I personally thought he ought to be saved, then I wouldn't be convinced that he was positively guilty then.

Q. So your feelings—

A. I mean, there's bound to be one of three I wouldn't agree with so I would have to vote no on one of them.

[VD 363] Q. In other words, I'm talking about if you feel the answers should be yes, yes, yes?

Ms. James: Your Honor, now the Prosecutor is attempting to get a commitment from him. I think he's going at this in such a way—

The Court: Overruled.

Q. (By Mr. Scott) I'm saying if the evidence convinced you the answers should be yes, yes, yes and yet at the same time, you feel the answers should be yes, yes, yes even though you know that's going to send him to the chair. Your personal feelings are that yes, I think it was intentional and yes, I don't think there was any provocation and yes, I think there's—more likely than not that he may well commit some sort of criminal acts of violence against property or people in the future, but I don't know how serious those acts are going to be.

Criminal acts of violence, I submit, could include breaking out somebody's plate glass window, it could be several acts. I don't know whether it was that or killing another Police Officer but whatever it is, I personally—even though I'm answering those questions yes, yes, yes—I personally

don't think this man deserves to die for what he did and therefore, [VD 364] because I feel that way, the only way I know to save him is to misanswer one of the questions and answer it no to save him.

Now, in effect, that is what a person is faced with. In other words, we don't have any quarrel with the person who feels that way, we just need to know it now. If you feel like you have to, in effect, misanswer a question to make a verdict fix your conscious—

A. No, I don't believe I would.

Q. You would go ahead and let the chips fall where they may?

A. Yeah, I think I would.

Q. What about on guilt or innocence? In other words—on guilt or innocence, if you felt the man was guilty and should be found guilty and yet you knew that a finding—you have heard enough evidence in the guilt or innocence phase to convince you you're going to answer those three questions yes, would you in any way, knowing that the ultimate—the guilty verdict is probably going to end up resulting in a death sentence because of the three yes answers that are abundantly clear in the case itself.

Would you in any way want to vote for not guilty to save him from the electric chair that way?

[VD 365] Ms. James: Your Honor, this question has been asked and it's repetitious. He's going over the same ground over and over again and I object.

The Court: Overruled.

Q. (By Mr. Scott) Would that interfere with your thinking?

A. I think if I had already made the decision in my mind that the answers to all three of them were yes and unless I—something come up that would disprove one of these three answers, I doubt if I would change.

Q. I'm talking about back on about guilt. In other words, would your feelings—

A. Oh, we're deciding the guilt or innocence?

Q. If you feel he's guilty but you honestly feel he should not get death, would that effect your deliberations on guilt?

The Court: Excuse me, pardon me. I think he's missed something in this. The trial actually has two parts.

Juror Jenson: Right.

THE COURT: The first part you decide is he guilty or not guilty. If you find him not guilty, that's the end of it [VD 366] If you find him guilty, then you get into a Punishment Hearing.

JUROR JENSON: Right.

THE COURT: And as a juror you never do vote life or death. All you do is answer three questions. Do you follow that?

JUROR JENSON: Right.

THE COURT: What Mr. Scott is asking you—he's back on the guilt or innocence part.

JUROR JENSON: Yes.

THE COURT: He's asking you, if after hearing the evidence, you go out and you have to decide is he guilty or not guilty. Is the fact that the death penalty will be a consideration down the line, if he's convicted, is the fact that it could wind up being a death penalty type of case, is that going to influence your verdict on guilt or innocence? Or, on the other hand, will you call it as you see it and if he's guilty, say he is and if he's not guilty, will you say so?

JUROR JENSON: I don't think so [VD 367] because even if we decide he's guilty or I decide he's guilty, you still have two alternatives. I mean, even if he's guilty, at that stage in the game, you don't necessarily have to decide whether he's—he'll get three yeses or two yeses and one no or what have you. You haven't sentenced him to the electric chair or what have you until the second stage and that's where you make the decision there. You kind of take it one step at a time.

Q. (By Mr. Scott) That's true. What we need to know is whether your feelings about the death penalty would effect the way you deliberated on the questions? Would it effect your—

A. Well, I think it probably would because afterall, you're talking about a man's life here. You definitely don't want to take it lightly. Now, if you went in here and, you know, if he was going to get life and probably paroled in some years, it puts a whole new light on the subject. But when you have got the death penalty to deal with, I think you have got to be pretty certain.

Q. So you feel your feelings would enter into the deliberations on those questions?

[VD 368] A. Right.

Q. And the feelings that you have, I take it, about the death penalty and its propriety, are strong, aren't they? Let me—I take it then, that mandatory penalty of death or imprisonment for life would effect your deliberations on the issues of fact in the penalty phase of the trial—those three questions on your deliberations?

A. Yeah, I think it would. But still again, if—if he's proven guilty, you know, beyond all reasonable doubt to me, and I think my conscious could clearly—I could vote—I think I could vote yes to all three questions. But, like I say, that's my conscious I'm dealing with.

Q. But if you found him guilty and then you're in the penalty phase and you really feel that he should not get death, I take it, that that feeling would effect the way you deliberated the three questions?

A. Well, I'm just human just like everybody else.

Q. Sure.

A. I think it probably will effect anybody's.

Q. I'm not going to argue with you about that. I just need to know. And we appreciate your being honest with us. So what you're saying is that it would effect your deliberations, your feelings about—

[VD 369] A. Right.

Q. —whether or not the guy ought to get life or death would effect the way you deliberated those three questions?

A. Yes, I believe so.

Q. And do you think it would—let me just say that there's an oath that a juror would have to take and from what you told me, you would not be able to take this oath, but let me go through it with you.

The oath is that the mandatory penalty of death or imprisonment for life that you would have to state under oath that it would not effect your deliberations on any issue of fact, including those three questions.

And I take it from what you've told said that you could not take that kind of oath, could you?

MS. JAMES: I object to the Prosecutor's conclusions, Your Honor.

A. Well, yeah, I guess it would.

THE COURT: Don't answer.

A. I don't know of anybody it couldn't because, I mean,

I haven't heard the evidence yet. I don't know what we're talking about. Now, if the evidence—if I hear the trial and I decided that the man is guilty, then I have heard all the circumstances, you [VD 370] know, you can have guilt but the circumstances—still the circumstances around it, you know, may change everything. I mean, a man goes out and steals a cow just for kicks. But a man that's starving to death goes out and steals a cow, is a lot different.

Q. Sure. What I'm getting at is, even though this oath is required, that is, that you just flat throw your feelings out the window, that's what the oath in effect requires—

A. Well—

Q. —you're saying you couldn't do that?

A. I don't think so. I don't believe anybody could because you might as well get a computer to sit on the jury.

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[VD 613] MR. GEORGE C. FERGUSON

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[VD 614] [By Assistant district attorney Winfield Scott]:

Now, we need to know from you just how you feel about capital punishment, about the death penalty. I know the Judge mentioned that to all the jury panel and could you share with us now what your feelings about the capital punishment, any reservations you have about it or any convictions you have regarding the subject.

A. Well, I would much rather see a life sentence. I don't even like hunting, I don't like to kill animals. So my feeling is that possibly it may be more painful to have a life sentence.

Q. All right. Do I take it from that that you're opposed to capital punishment?

A. Yes, I am.

[VD 615] Q. And have you been opposed to capital punishment most of your life?

A. Yes, I have.

Q. And I take it you have strong feelings on that point, don't you?

A. Well, pretty strong. Of course, you know, someone—if in self defense, I wouldn't have any feeling about it, I would do it, but otherwise, I do.

Q. I'm talking about the legalized execution. I'm talking

about legalized—in other words, placing someone in an electric chair and running electricity through his body.

A. I don't think I want to do that.

Q. And I take it from what you have said, that you personally just flat, because of the way you feel, could not be involved in that yourself?

A. It would be too hard for me to do. Now, I'm not going to say that I might not see enough that would convince me, but at that point, I would say it would be almost impossible that I should say, kill somebody.

Q. And so—well, your feelings on the subject, I take it, are strong enough that you have grave doubts in your mind that you would never vote for death?

[VD 616] A. I believe so.

Q. All right. Do you think there is conceivably ever a case that you personally would ever take pen in hand and sign your name to a death warrant?

A. I don't believe so.

Q. You don't think you could ever do that?

A. I don't believe so.

Q. Are you then really flat opposed to the death penalty to the extent where you would automatically have to vote against it in order to be straight with your conscious?

A. With my conscious, yes.

Q. You would have to automatically vote against that?

A. Yes.

Q. All right. Now, I understand your position, sir, and I'm sure your feelings are firm and fixed on this point, but the law requires me to go a step further and then we'll be done with this and hopefully your service—it will be clearer what your position is. But let me—the law requires I go one step further because of the new procedures that we have.

The law as it stands now in Texas, you don't simply go out and deliberate on guilt or innocence and then death or not death. The procedure is a little [VD 617] different than you might have expected. There are actually three questions that you answer and these three questions are as follows: whether the conduct of the Defendant that caused the death of the deceased was committed deliberately and intentionally and with reasonable expectation that the death of the deceased or another would result.

The second question is whether there is a probability

that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society. Now, that addresses itself to the future and has to do with criminal acts of violence. Now, it doesn't say acts of violence against people or property. It could be either one. And it doesn't talk about how serious those acts have to be; whether it's murder or breaking out somebody's plate glass window or what have you. But it does talk about it in terms of acts instead of one future act.

Now, the last question has to do with, if raised by the evidence, whether or not the conduct of the Defendant in killing the deceased was unreasonable in response to provocations, if any, by the deceased. Of course, if there's no provocation, the answer to that question would automatically be yes.

The law says once a jury starts their [VD 618] deliberations in an effort to answer those three questions, the answers naturally have to be either yes or no. And the law says if the jury comes up with three yes answers then that is a mandate to the Judge to sentence the Defendant to death.

Now, the Judge has no discretion at all in the matter. Three yes answers equals death by electrocution. One no in that group would result in a life sentence. In other words, that's the only other punishment that's available.

Now, as you can see, that's sort of an indirect death sentence but it's nonetheless, just as much a death sentence whether you go at it directly or indirectly. The end result is still the same.

Now, I take it that your feelings are such about capital punishment that your feelings would effect your deliberations in a case on the issues?

A. Well, the three questions that you mentioned, I think I could honestly try to answer those questions the way I saw them.

Q. I understand.

A. But as far as voting for the death penalty, I wouldn't want to do that.

Q. Well, do you understand that's, in effect, what you would be doing?

[VD 619] A. Yes, I understand that and in a round about way you're doing it.

Q. It's not round about, three yes answers, that's death and that's my point. We don't want to thrust you on a jury and cause you to violate your conscious. And if you're telling us that you honestly could not, in good conscious, allow yourself to be put in the position of having to ever answer those questions because of your feelings, well then, we understand.

You see, a lot of people come down and think well, if I don't agree to be on the jury, then I'm not being a good citizen and that's just not true. You're being just as good if you honestly tell us how you feel inside. That's just as important to law enforcement and to the administration of justice, as to the person who comes down and says yes, I can serve. Some—not everybody can fill those twelve seats.

From what you have told me earlier, I got the distinct impression if you were forced to anwser those questions, if you were forced to deliberate on death, that you personally just could never be a person who could do that?

A. It would be hard.

Q. And I know what you mean when you say it would be hard, but I actually have to carry it a step [VD 620] further and just ask you; you had said earlier you would automatically have to vote against death and I take it that's the way you honestly feel?

A. At this point, I think it is.

Q. All right. And so therefore, I take it that you could not state under oath that the mandatory penalty of death or imprisonment for life would not effect your deliberations? I take it they would effect your feelings about that, would effect your deliberations on any issue of fact.

A. Well, they might. Of course, I have got a son that's a Policeman. He's been a Policeman twelve years and if this had been my son, then I might feel all together different.

Q. All right.

A. I don't know, but like I say—

Q. Well, it makes a big difference if it's somebody in your own immediate family. And I think that that's why jurors cannot be on a case that they're directly involved in. This wasn't your son, Officer Wood, and I think—I know a lot of people who share your feelings about things like this, that if it was someone in your own immediate family, you might want to take matters in your own hands.

But as far as being on a jury, obviously, you could never be on a jury [VD 621] involving someone in your immediate family. Are you saying that unless it were someone in your immediate family?

A. No, I'm not saying that. I'm saying my feelings would probably be much stronger and had it been my son, I might be able to sit on a jury and be able to say I voted for the death penalty. But since it isn't, I think that would be an indelible memory that I would have.

Q. Such an indelible memory that you just—

A. I think it would be troublesome to me.

Q. And you're afraid it would affect you to the extent that you could not in good conscious ever consider the sentence of death, whether you arrived at it directly or indirectly?

A. I don't believe I could.

Q. And therefore, you could not state under oath that the mandatory sentence of death or life would not affect your—it would affect your deliberations?

A. Yes, it would.

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[VD 623] THE COURT: All right. Now, so the question is, could you give us your assurance without reservations that if [VD 624] you're on the jury and you found him guilty of capital murder, that your deliberations on those issues of fact on those three questions, could you give us your assurance that you would not be influenced in answering those questions by the punishment of death or life imprisonment?

MR. SCOTT: Your Honor, I would ask that it be posed to the other alternative also since he's indicated all along—

THE COURT: Let me get a clear cut answer to this first because I don't know that it's been put exactly in those terms.

JUROR FERGUSON: I can't, at this point, see how it could keep from influencing me in some fashion. Now—

THE COURT: Now, life imprisonment?

JUROR FERGUSON: No problem.

THE COURT: All right. Well, do you think that punishment of death would affect your deliberations on the issue of facts involving the punishment hearing in a capital murder case?

JUROR FERGUSON: Well, if you were [VD 625] putting me in a situation where I knew it was—saw it was a yes answer to those three questions that, in effect, I would be doing the same thing as sending him to the electric chair.

THE COURT: Is what you're saying, knowing he would go to the electric chair, are you saying that would affect your ability to answer those questions?

JUROR FERGUSON: It wouldn't affect my ability, but it would cause me to do some squirming trying to be honest in my answers if I felt like the answers to the three questions was yes.

THE COURT: Do you think it would affect your deliberations on these issues of fact?

JUROR FERGUSON: I don't see how it could keep from affecting it some.

THE COURT: All right. Do you have any further questions, Mr. Scott, in light of that answer?

MR. SCOTT: No, but we would like to submit for cause both under Witherspoon and under the oath, 12.31.

[VD 626] THE COURT: I'll take it one step further now. From what you say, are your feelings in this regard so strong that you could not set aside those feelings and vote on those issues of fact on a punishment hearing and set out of your mind the question of the death penalty? This is another way of saying the same thing, I guess. But are you saying under all circumstances that it would influence your deliberations on these fact issues?

JUROR FERGUSON: I don't see how it could keep from influencing it. That's what I'm trying to say.

THE COURT: I understand.

JUROR FERGUSON: I don't see any way that it could not in some fashion influence my thoughts. Now—

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[VD 1017] NELDA COYLE

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[VD 1023] [By Assistant district attorney Steve Tokley]:

Q. The first thing I'm going to tell you is that this is a capital murder case. By that I mean it's the type of murder where if the Defendant is found guilty he would receive only one of two possible punishments, either a sentence of death

or a sentence of life. Those are the only two possible punishments.

In this case the District Attorney's office is seeking the death penalty. Now, knowing that I want you to tell me what your feelings are about the death penalty.

A. You mean if it should be?

Q. Yes, to start with.

A. Well, I'm not against it in certain circumstances.

Q. Are you in favor of it in certain circumstances?

A. Yes.

Q. Okay. Now, how long have you been a believer in the death penalty in certain types of cases?

A. Always.

Q. Always?

A. Ever since I can remember.

[VD 1030] And may I, from talking to you, aren't you telling me that—or are you telling me—let me put it this way: Are you telling me that the mandatory sentence of death or life would affect you in your deliberations on any of those issues of fact?

A. I believe so.

Q. That is what I understood from talking to you. And may I take from what you just then said that you could not say under oath that the mandatory sentence of death or life would not affect you in your deliberations on any issue of fact?

A. It would bother me.

Q. It would affect you in your deliberations, is that what you are saying? I have to ask you in the words of the law.

A. Yes.

[VD 1031] Q. And therefore, since the mandatory sentence of death or life would affect you you could not say under oath that it would not, is that correct?

A. Right.

* * *

[VD 1046] THE COURT: Let me see if I can be of some help. It's really this simple. When you deliberate to decide upon a fact in this case, to decide factual issues whether it is—whether the Defendant is guilty, whether you should answer the question yes or no, whatever, the law says in order to be qualified to be on this Jury you have to be able to give these lawyers and give me the unequivocal assurance that when you deliberate with the other jurors on those

questions that you will not be affected in any way by the punishment that could result from the case. That in deciding whether the Defendant for instance would commit future acts of violence and in reaching your decision on that and in voting and filling out a [VD 1047] verdict form, that you wouldn't be influenced in any way by the fact that death might result or life imprisonment might result. That you will simply listen to the evidence and decide those facts without regard to what the effect would be, whether life or death would ensue. Do you follow?

JUROR COYLE: (Juror nods.)

THE COURT: Some people can do this and some people can't. Some people can sit on a jury and listen to the facts and reach a decision based upon the facts decide if it was deliberate, if there is a probability of future acts of violence and whether or not there was provocation that was reacted to or not. Other people can't. They feel that, well, if I'm on the jury there is no way that I can really put out of my mind about death or life and just answer the questions and I know that I would be affected by what punishment would result in trying to answer these questions. Do you follow [VD 1048] me?

JUROR COYLE: Yes.

THE COURT: Now, what I think this is—what Ms. James is getting at and it's the very question Mr. Tokley asked perhaps in a little different words. Where do you stand or sit on this? In other words, would you be——

JUROR COYLE: Like I told him. I haven't done this before so I would simply not know.

THE COURT: Okay. I understand your answer.

JUROR COYLE: Do I have to say yes or no?

THE COURT: No, if you don't know, you don't know. Up to this point, you see, the State is entitled to have twelve jurors that can follow all of the law in this case and the defense is entitled to have twelve jurors the same. That is why we spend so much time talking to the jurors. There aren't any right or wrong answers, don't concern yourself about whether [VD 1049] you are—what you are saying is wrong or right. All we are trying to do is find out how you feel.

Now, the State is entitled and the defense is entitled to twelve jurors who will listen to this case and can assure all

of us at the outset that their deliberations on these factual questions will definitely not be influenced by the punishment.

What you are saying, as I understand it, is that you really don't know, and I take it by that to mean you are not sure if it would and you are not sure if it wouldn't?

JUROR COYLE: I haven't done this before.

THE COURT: But is that a fair statement of what you are saying?

JUROR COYLE: Yes.

THE COURT: Okay. Now, to take that to the next step, is that to say that it is possible that your deliberations on these factual issues could be affected by the punishment?

[VD 1050] JUROR COYLE: That I couldn't answer because of the punishment.

THE COURT: Well, not that you could not answer it but that your answer or your deliberation would or could possibly be affected by the punishment that might result?

JUROR COYLE: I'm not sure I understand what you mean.

THE COURT: Okay. My question is, both sides are entitled to have twelve jurors who unconditionally guarantee us that when you are deliberating on these fact issues, when you go back and deliberate your verdict, you are trying to decide should I answer this question yes, should I answer this question no, should I answer this question yes, should I find him guilty or not guilty, that in deciding these things that the punishment of life or death would not affect your deliberations, that you would deliberate on those fact issues without regard to what the punishment is in the case.

[VD 1051] JUROR COYLE: Yes, well, I think I could answer that.

THE COURT: Now, earlier you had told Mr. Tokley, I believe your statement was that you could not or you were not sure if the punishment that might result whether it would or would not affect your deliberations on these fact issues.

JUROR COYLE: It's difficult for me to say because I have never been in this position before.

THE COURT: Now, what—the reason we all dwell on this so long is very simple. The law says that nobody can serve as a juror on a case where the death penalty could be involved, in a capital case, nobody can serve on that jury unless they can definitely assure all of us that they will in

no way be affected in their deliberations of facts by the punishment that is involved.

Now, if we cannot get this assurance then you are not a qualified [VD 1052] juror, you see? Even though you would say well, maybe I could and maybe I couldn't.

JUROR COYLE: Well, I'm sorry. I follow you. I just don't know.

THE COURT: That is fine. If that is the way you feel that is fine because we get a lot of people that say I won't be affected and a lot say that they would. And there are also a lot that say I really don't know.

You see, it would not be fair to the Defendant for instance——

JUROR COYLE: I understand.

THE COURT: You see, to have a juror that might gauge a certain answer to get a certain result on punishment would not be fair.

JUROR COYLE: I understand.

THE COURT: And the same to the State. So that is why we have to have this assurance from the juror that there is no question in your mind but what you could follow the law and not be affected in your deliberations by [VD 1053] the punishment.

Now, I understood earlier, and let's go back to this, that what you are saying is you are not sure?

JUROR COYLE: That's right. I haven't done this before.

THE COURT: Okay. And that maybe you won't be affected and maybe you would? Now, I take your unsure to mean maybe I would and maybe I wouldn't?

JUROR COYLE: I know it's sort of wishy-washy.

THE COURT: No.

JUROR COYLE: But I can't tell you something that I haven't done.

MS. JAMES: Actually, Your Honor, I believe the best qualified jurors are those that come with no preconceived notions.

THE COURT: That might be, Ms. James, but let me finish this.

What I'm trying to do, I guess, is to find out more about what you mean when you say that I'm not certain or I don't know, because it's the I don't [VD 1054] know that really brings the problem. It's the I don't know or I'm not sure

means that maybe I would not be affected or maybe I would be affected, is that what it means, the I don't know, because until I get there I won't know and it's possible I could and it's possible I couldn't?

JUROR COYLE: Right.

THE COURT: Okay. You understand the situation we are in now is, and I'm not trying to get you to change your answers, I know you won't, you tell us exactly how you feel, that is what this is all about right here. The dilemma right now is that Ms. James wants to find out for certain whether or not you could or could not—back up.

We need to know before you can be on the jury, we have to know that you would not be affected by the punishment in your factual deliberations and I understand at this point in time that—what you said is you cannot give us [VD 1055] that assurance.

JUROR COYLE: (Witness nods head.)

MR. TOKLEY: Let the record reflect her answer was yes.

THE COURT: You have to speak out so she can take down what you say. What was your answer to that, ma'am, you nodded yes, but what was your answer?

JUROR COYLE: Rephrase it.

THE COURT: All right. As I understand it you are not able at this point in time to asure us that your deliberations on the fact situations would not be influenced by the punishment, is that correct?

JUROR COYLE: That's right.

• • •

[VD 1063] Q. (By Mr. Tokley) All right. Then the question was asked of you, we discussed the procedure in this type of case. I discussed it with you, the Judge discussed it with you and Ms. James has discussed it with you, that the procedure being this is a trial in which there are two parts. The first part has to do with whether or not the Defendant is guilty of the crime that is charged. That is an issue in the case. If guilty then the second part has to do with whether he receives the death penalty or life sentence. That is determined by the answering by the jury of three questions. We discussed those three questions and discussed that three yes answers equal death, one or more no answers will be a mandatory life sentence.

And then I asked you after explaining the State's burden of proof throughout the case, I then asked you if your feelings concerning the mandatory sentence of death or life would in any way affect your deliberations on any of those issues of fact in the case.

MS. JAMES: Your Honor, I would object to the prosecutor attempting to [VD 1064] lead the witness, that each and every time that the witness gives——

THE COURT: He hasn't finished the question yet.

MS. JAMES: I'm making my objection.

THE COURT: When he finishes his question, I will allow him to finish the question before I allow your objection.

MS. JAMES: I thought he was finished. Excuse me.

Q. (By Mr. Tokley) I believe you said that at first you didn't know whether it would or not?

A. That's right.

Q. Is that the way you feel?

A. Yes.

Q. And therefore——

A. But if I had to make a decision, I guess I'm goofing this whole thing up, but I don't know what else to say.

Q. Well, I think what we want to know from you is—you have told us and I think you have tried to tell us and have repeated it more than [VD 1065] one time, that you cannot tell us whether the mandatory sentence of death or life would affect your deliberations or not?

A. I haven't been there.

• • •

[VD 1067] Q. (By Mr. Tokley) Mrs. Coyle, can you tell us at this time unequivocally that the mandatory sentence of death or life would not affect your deliberations on any issues of fact in the case?

MS. JAMES: The same objection, Your Honor.

THE COURT: Same ruling.

Q. (By Mr. Tokley) Can you tell us that or can you not?

A. I cannot tell you this because I don't know.

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[VD 1525] MRS. LLOYD WHITE

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[VD 1528] [By Assistant district attorney Steve Tokley]:

Q. What are your feelings about the death penalty?

A. I guess I just don't believe in capital punishment then.

Q. Fine. No one has any quarrel with you about that. You are certainly entitled to that and that is what we need to find out from you.

THE COURT: Let me help, see if this will help you relax a little bit.

There is no right or wrong answers, it's a question of how you [VD 1529] feel. And the most important thing is that the lawyers and I know how you feel about these things. That is all we are trying to do is to find out how you feel, okay?

And as I understand it you do not believe in or are opposed to capital punishment; is that correct?

JUROR WHITE: Let me say this: I always thought I believed in capital punishment but as soon as—when it comes to me, someone asking me, it's just difficult.

THE COURT: Let me try it this way—

JUROR WHITE: It's hard to answer or something.

THE COURT: All right. Let me ask you this, Mrs. White. There is one group of people we run into who believe in the death penalty, they believe it's a good law, they can sit on a jury and vote on it in a proper case if they thought it was proper.

Another group is opposed to the [VD 1530] death penalty, they don't want anything to do with it, they wouldn't vote for it.

There is another group that believes in capital punishment but they don't themselves believe that they themselves should be the ones to have to sit and vote it although they believe in it, they themselves could not sit on a jury and vote for it.

There is yet another category that are opposed to it but they feel they could sit on a jury and do it even though they are opposed to it. Even though—because it is the law.

JUROR WHITE: I think I believe in capital punishment but I don't want to have anything to do with it, is that clear?

THE COURT: Well, that helps us understand.

JUROR WHITE: That is my feeling.

Q. (By Mr. Tokley) All right. You believe in capital punishment but you personally [VD 1531] could never sit in a case which would call upon you to make decisions that could lead to a man's death?

A. Uh-huh.

Q. That is your feeling?

A. Yes.

• • •

[VD 1535] Now, you have told us that even though philosophically you are in favor of capital punishment you yourself personally could not be involved in this kind of situation, am I correct?

A. Yes, sir.

Q. All right. May I from your answers—are you saying that this mandatory sentence of death or life would affect your deliberations on the issues of fact in the case including those three questions, is that correct?

A. Yes, sir.

Q. No doubt about that I presume, but the mandatory sentence would affect your deliberations?

A. Well—

[VD 1536] Q. Do you understand my question?

A. No. Say that again, please, sir.

Q. You have indicated to the Judge quite strongly that you personally even though believing in the death penalty could not, because of your own reasons and your own make-up, sit in this type of case and make decisions that could result in the death penalty, we are clear on that?

A. Uh-huh, yes, sir.

Q. From that then are you saying that the mandatory sentence of death or life would affect you in your deliberations on the issues of fact in the case?

A. In voting on it, is that what you mean?

Q. In your deliberations on it, yes.

A. Well, I don't know.

Q. You cannot say that it would not, is that correct?

A. Yes.

• • •

[VD 1543] THE COURT: Let me ask you this: Would you ever in a case, would you ever be able to, if you were a juror, we are talking hypothetically, if you were a juror would you ever be able in a capital murder case to vote yes to all three of those questions if the [VD 1544] evidence dictated to your way of thinking that the correct answer would be yes, would you ever be able to vote yes to all three questions in a

capital murder case realizing that the death penalty would result?

JUROR WHITE: I don't think so.

THE COURT: All right.

MR. TOKLEY: I challenge for cause, 1231.

THE COURT: Let me go back and ask this. If you were on this jury, could you give your unequivocal assurance, I'm asking hypothetically, could you give us your unequivocal assurance if you were on the jury and if you did find him guilty of capital murder that you could answer those three questions on the punishment part without in any way being affected by the punishment that exists, the death or life punishment, or do you think that knowing the punishment is there would affect your deliberations on those questions? [VD 1545] JUROR WHITE: It would probably affect me in my deliberations.

THE COURT: All right. Would it be fair then to say that you cannot give us your assurance that you would not be affected by the punishment of life or death in deliberating the fact issues in the case?

JUROR WHITE: That's correct.

• • •

[VD 1547] THE COURT: I think what Ms. James is saying, could you ever if the case was just bad enough, could you ever set aside your feelings and vote for the death penalty either directly or indirectly?

JUROR WHITE: I guess I could, I guess I could.

Q. (By Ms. James) All right. That is the answer. There are no right or wrong answers but that is your answers that you could?

A. I guess I could.

Q. You could set aside your own personal feelings and vote yes if the facts definitely justified it?

A. I guess I could.

Q. We would not want you to vote yes—we need your honest vote on the questions, not on your feelings. In other words, if you felt that the fellow should get death but you feel some of the [VD 1548] answers should be no you would be obligated to vote no in answer to the questions regardless of your feelings and also the converse is also true. If you

felt that some of the questions or all of the questions should be answered yes but your personal feelings were to set it aside and attempt to save him from the penalty, whichever it is, you would still have to answer yes if you honestly feel that the answer to that particular question should be yes, you understand now?

THE COURT: Do you understand what she is saying?

Q. (By Ms. James) You have to have—you have to vote the question—the answers to the questions honestly irregardless of what you think the penalty should be, do you think you can do that?

A. Yes.

Q. If the facts and circumstances justified it?

A. Yes.

Q. A yes or no answer—you would answer yes or no irrespective of how you would—you would set aside your feelings about how you thought the punishment should come out?

A. I think so.

• • •

[VD 1558] MS. JAMES: Your Honor, I again object to this question, it's been asked and answered on the first go-around. I think they finally did answer the first time they went around. [VD 1559] She did not think her fact deliberations would be unequivocally——

JUROR WHITE: Well, I don't think—I think that was wrong.

THE COURT: Your objection is overruled.

JUROR WHITE: I think I answered wrong. I think I have got to go back the other way now.

THE COURT: Well, that is what we are trying to find out.

JUROR WHITE: Now, am I making myself clear now?

THE COURT: Well, the reason I go into it is because I think that you originally answered it one way and then answered it a different way, is that right?

JUROR WHITE: I think that is what I did, yes.

• • •

[VD 1562] [By the Court]:

Now, my question is: In deciding and deliberating these fact issues in the case could you give us your assurance that in deliberating on these fact issues that you would not be

affected by the mandatory punishment of death or life imprisonment?

[VD 1563] JUROR WHITE: I could not give you my assurance that I would not be affected.

THE COURT: Okay. Are you saying then it's possible you would be affected, is that a fair statement?

JUROR WHITE: Yes, sir.

THE COURT: Okay. Thank you very much.

Do you submit the juror based on that?

MR. TOKLEY: I challenge for cause.

THE COURT: Now, she is passed to you for further questioning on this issue.

CONTINUED EXAMINATION

BY MS. JAMES:

Q. I'm sorry we have to go over it again but I understood you to say when we asked you at the beginning could you lay your opinion and your feelings aside and answer the questions honestly, I think you said yes?

A. I did but I cannot say yes to that now. That is not—I couldn't lay my feelings aside.

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[VD 2571] CURTIS WILLIAMS

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[VD 2576] [By Assistant district attorney Winfield Scott]

Q. Okay. Can you tell us how you feel?

A. I think a person should be punished if they have done wrong.

Q. What about capital punishment, the ultimate punishment?

A. First, killing another person, killing someone, I don't know about that. I don't know.

Q. Let me ask you this: Are your feelings such that you don't really know how you feel about it?

A. I just don't know how I feel.

Q. All right. Are they such that you really, as you sit there now, don't know whether you could vote [VD 2577] for death or not?

A. I don't know whether I could vote for death or not, I just don't know.

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[VD 2585] Q. (By Mr. Scott) Can you tell us now whether [VD 2586] or not you could ever vote for the death penalty, to your present way of thinking?

A. (By the witness) I don't know.

Q. You don't know, all right. So you can not tell us that your mind is open to it right now, is it?

A. No, it's not.

Q. Some day in the future you might be able to vote for capital punishment——

MS. JAMES: That's leading.

THE COURT: Sustained.

Q. (By Mr. Scott) Do you or not think that maybe some day in the future you may be able to vote for capital punishment?

A. (By the witness) Probably. I don't know.

Q. But not right now?

A. I don't know whether right now——

MS. JAMES: Object, leading.

THE COURT: Sustained.

Q. (By Mr. Scott) How do you feel right now? That's all we want to know.

A. Well, like I said, I believe in punishment.

Q. Yeah.

A. Punishing a person if they've done wrong. But if—taking another person's life—for a life, I just couldn't.

[VD 2587] Q. You couldn't do it?

A. I don't think I could.

Q. You don't think you could ever do it?

A. The way I feel now, I don't think I could do it.

Q. Do you feel that way pretty strongly?

A. Right.

Q. We're talking about right now.

A. Yes.

Q. Do you think the way you feel right now that you'd have to right now, at least, automatically vote against the death penalty?

A. I might, probably.

Q. Is that the way you think you feel?

A. Right.

Q. Okay. And to your—the way you feel now, tell us yes or no, do you feel like that you could never ever vote for the

death penalty right now? Maybe some day, but not right now?

A. Maybe some day, not now.

Q. Right now, you flat could not?

Ms. JAMES: Object, leading.

THE COURT: Don't lead.

Q. (By Mr. Scott) You flat could not, no matter how aggravated the facts, give death?

[VD 2588] A. (By the witness) I don't think I could.

Q. Do you feel pretty strongly about that?

A. Yes, sir.

Q. So when you say you don't think you could, are you saying you flat couldn't? We need a firm answer from you.

A. That's—it's kind of hard to do. It's like saying you can go out there and run in the back of another car, but once you are there——

Q. I know where you are now mentally, not in the future, but right now. Are you not of a frame of mind that you could ever, right now, this moment, ever, no matter how aggravated the facts, give a sentence of death? And you've said you didn't think so. Are you saying 'No, I couldn't' or 'I can't say' or 'Yes, I could'?

A. I don't know.

Q. You don't know?

A. No.

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[VD 2591] Q. (By Mr. Scott) Let me go to 1231. Let me read this to you. It says: "In order to be qualified to serve on the Jury a Juror has to be of the frame of mind that the mandatory punishment of death or life imprisonment will not affect their deliberation on any issue of fact."

Now, if your feelings about capital punishment, about whether or not you could ever give it, would affect you in your deliberations, then you are not a qualified Juror, and that's the end of it.

Is that the way you feel, or am I wrong?

A. (By the witness) Well, like I've told you, if a guy that killed somebody—I can see him receiving a sentence or something like that, but I don't think [VD 2592] I could just—depending on me to say, 'Kill this guy,' I don't think I could do that.

Q. When you say "I don't think" are you saying you couldn't do it?

A. I can't do it.

Q. All right. I think we've finally broken the ice. It doesn't hurt to say 'I can't do something.' I know that's not easy for someone to say. I appreciate your candor. A lot of people feel that way. You're not less of a citizen because you feel that way. There are a lot of things I can't do personally. There's nothing wrong with that.

Are you saying, then, and I know how you feel, but I've got to kind of belabor the point to make it clear to all, are you saying you flat—your feelings right today are such that you could never ever vote in such a way as to sentence a man to his death? You personally.

A. I don't think I could.

Q. You could not or you do not think you could?

A. I don't think I could.

Q. Are you saying, then, that your feelings would affect your deliberations, how you feel about it?

A. Probably.

• • •

[VD 2595] THE WITNESS: If I knew all three questions was going to kill a guy, I don't think I could answer them yes.

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[VD 2596] THE COURT: In other words, a Juror has got to be able to answer the questions yes or no. And what the law will not allow is a person who is on the Jury to go into the jury room and answer those questions with regard to what the—punishment would result.

In other words, if the evidence, to a Jury's mind, says the answers should be yes, then the Juror should be able to write yes. Okay, you know if you answer all three, then he gets death, and you know if you answer any one no, he gets life, right?

THE WITNESS: (Witness nods head, indicating affirmative response.)

THE COURT: Now, if you're on the Jury, would you be able to decide those questions without any regard whatsoever to the punishment that would follow, in other words, about life or death?

Or, on the other hand, would your deliberations be affected—your deliberations on fact issues be affected by the punishment of death or life? Do you understand?

THE WITNESS: Yes, I understand.

THE COURT: What is your answer?

[VD 2597] THE WITNESS: I could answer the questions.

THE COURT: All right, sir. Would you and could you answer all three of those questions yes if the evidence says, to your way of thinking, that the questions ought to be answered yes?

THE WITNESS: That's right.

THE COURT: Even though you realize if you did answer yes that the death penalty is going to come out of that, could you still answer those questions yes? That's what I'm getting at. If you can, you can; if you can not, you can not. We just need to know how you feel.

THE WITNESS: I guess I could answer all three questions yes.

THE COURT: Say you're back in the jury room and found him guilty in capital murder, you're voting on these questions with the other Jurors; and let's say under the evidence you heard that you believe that the right answer to all three of those questions is yes, okay?

THE WITNESS: Right.

THE COURT: You know that if you vote yes on all three questions that his punishment is going to be death; and my question is, under those circumstances would you go ahead and vote yes or [VD 2598] would you be influenced by the death penalty part to keep you from voting yes?

THE WITNESS: I think I would be influenced by the death penalty.

THE COURT: Do you think the punishment of death would affect your deliberations?

THE WITNESS: Yes.

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[VD 2602] THE COURT: Let me ask you again, in your [VD 2603] deliberations on the issues of fact, in other words, those three questions we've talked about, would you be

affected in your deliberations by the punishment of death or life imprisonment?

THE WITNESS: That's right.

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[VD 2692] BOBBIE ANDREWS

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[VD 2697] [By Assistant district attorney Winfield Scott]:

Can you give us a clear unequivocal answer about how you feel about it?

A. (By the Witness) Well, I think I'm in the group that believes in it, but I'm not sure I would want to be a part of administering it.

Q. All you have to tell us, and then you'll be on your way home, you personally could never ever vote for it yourself even though you may personally be for it, if that's the way——

A. I don't believe I could do it.

Q. When you say, "I don't believe I could"——

A. I've never been in this position.

Q. Are you saying you flat could not do it yourself?

A. Yes.

Q. All right. Are you—is there any equivocation on your part? Or are you flat saying, 'I could never, ever do it no matter what the facts or circumstances are. I might be in favor of it as a concept in society, in an abstract sense, but I personally could never do it'?

A. Yes.

Q. No ands, ifs or buts about it?

[VD 2698] A. No.

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[VD 2704] We come back to statutory Article 1231; if you are on this Jury could you give us your unequivocal assurance that the punishment of life or death would not affect your deliberations on any fact issues in this case?

THE WITNESS: I don't believe I could give you my unequivocal assurance.

THE COURT: Are you saying it is possible that the punish-

ment of life or death might affect your deliberation on the fact issues?

(Pause.)

THE COURT: The reason I put it—let me explain it this way: I think very often Jurors fall into one of several categories, 'Yes, I would be affected,' 'No, I would not be affected,' or 'I don't know.' You see?

THE WITNESS: Uh-huh.

THE COURT: I don't know that there's really [VD 2705] anywhere else to fall, but I'm not sure. It's either yes or no or I'm not sure. I'm not trying to limit you, I'm saying this in an effort to find out how you feel.

In other words, to be on the Jury you have to be able to give us the assurance that your answers to fact issues would not be affected—would not be affected by the punishment of life or death.

It would not be right to the Defendant, for instance, if a Juror felt, after hearing all the evidence, 'By golly, he ought to die in the electric chair' and went back there and answered those questions yes to see to it by the answers that he got death. Do you see what I mean?

THE WITNESS: Uh-huh.

THE COURT: Those questions are not geared to letting the Jury manipulate the answers. The answers have to be honest.

Nobody has any quarrel with the way you feel. If you will be affected, not be affected, or you don't know. It's that simple.

So let me give you the question one more time. Would the mandatory punishment of death or life affect your deliberations on any fact issue [VD 2706] in this case?

THE WITNESS: (Pause.) I have to say it would.

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[VD 2708] [By defense counsel James]:

Now, what I'm trying to say, do you mean to say there's no situation, no matter how aggravated, no situation in which the facts could be so vile and aggravating that you could never, ever consider giving the death penalty as the penalty for capital murder?

A. I certainly could consider it. I was just answering his

question. I felt my feelings might enter into it. I do not believe in taking someone else's life.

MS. JAMES: I hope none of us do.

MR. SCOTT: Object to her side bar comment.

THE COURT: Sustained. Ms. James, go ahead with the next question.

MS. JAMES: All right.

Q. (By Ms. James) Now, well, would you share with us the reason why you feel that it might affect your deliberations?

MR. SCOTT: If she knows.

THE COURT: If she knows.

A. (By the Witness) Well, I would feel that I had had a part in being responsible for someone's life being taken.

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[VD 2719] [By defense counsel James]:

Q. Would there be any feeling in your mind that you would automatically always vote against death as a punishment whenever you have formed an opinion that the person on trial is guilty and the offense is capital murder, even though you formed that opinion?

A. Would I automatically vote against it?

Q. Yes.

A. I just said that I was afraid I could not lay aside my feelings. I don't know that I would automatically vote against it.

Q. Regardless of your views on capital punishment, can you render an impartial verdict on whether [VD 2720] the Defendant is guilty or innocent?

A. Well, I don't see how I can answer that question today. Ask it again.

Q. Regardless of your views on capital punishment could you render an impartial verdict on whether the Defendant is guilty or innocent?

A. Well, I said that I'm not sure my feelings would not affect my decisions. So I think that answers your question.

• • •

[VD 2726] THE COURT: Can you assure us that your—can you assure us that the mandatory punishment of death or life imprisonment would not affect your deliberations on any fact issue in this case if you're on the Jury?

THE WITNESS: That's what I said I could not assure you of.

THE COURT: The reason—okay, go ahead.

THE WITNESS: Well, I still feel the same way. I don't understand why she's, you know, trying to put it in a different way so I would answer in a different way.

THE COURT: We come back to the ultimate question——

THE WITNESS: Well, I have given you my answer, but . . .

THE COURT: What I'm asking is your answer, as you said earlier, or is it different, or what?

THE WITNESS: Well, you know, it's hard for me to visualize—I would not want to be dishonest in the way I answered the questions. But my [VD 2727] personal feeling is I don't want to be a part of taking someone's life.

Now, is that—you know, are those two answers not compatible?

THE COURT: I don't want to comment on that, because in the end I have to come back to the statutory question. We can not impanel, under the law, anyone—anybody on this Jury unless and until that Juror can swear under oath that the mandatory punishment of death or life imprisonment will not affect their deliberations on any fact issue in this case.

THE WITNESS: Okay. I can not do that.

THE COURT: You can not swear to that?

THE WITNESS: Right.

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[VD 4443] ANTHONY GUIFFRIDA

• • •

[VD 4448] [By Assistant district attorney Winfield Scott]:

Could you give us your personal convictions, your personal feelings about the death penalty and capital punishment?

A. I think I feel the second group in that respect. Many times I have said that they deserve this or that, but to actually put my hand to it, I don't think I could. I don't think I could.

Q. No quarrel with that at all. Again, I strongly feel that people have a right to feel how they want to in this country, and I have got some strong feelings myself about some of our laws, and if I were on a jury, I'm not sure if I could follow certain of our laws personally.

Again, you can feel one way about a law or the fact that it exists in our society and that there's a need for it, but you also have a right to your feelings. A lot of people feel exactly like you do, and they have no quarrel with the law, but it's just that they personally could never be the one who actually sentences someone to their death.

[VD 4449] A. It's because I feel—well, if it were not something that affected me, maybe I would have a different attitude. I don't know.

Q. You mean if it was someone in your own family?

A. Yes.

Q. Obviously you would not be a proper juror if it involved someone in your own family, but would it be fair to say that if it wasn't someone in your family that you personally would never feel like you personally could ever vote for the death penalty?

A. I really don't know.

Q. Well, then let me explain. There's nothing wrong with not knowing if you're not sure.

Would it be fair to say this. You could not give us the assurance that you would ever be able to vote for death?

MS. JAMES: I ask that he rephrase it, leaving out the double negative.

THE COURT: Overruled.

A. (By the Witness) At this point I really don't know.

• • •

[VD 4452] Q. So as you sit right now, you cannot really assure us that you could ever personally vote for death. Would that be a fair statement?

A. That's true.

Q. All right, and would it, therefore, be a fair statement that because of your feelings about being uncertain, about personally being able to give the death [VD 4453] penalty, am I correct that your feelings would affect the way that you deliberated the case? Your uncertainty at this point?

A. Yes.

• • •

[VD 4456] I think the real problem comes with what we are getting ready to go into. You have said the way you pretty well feel. You cannot assure us that you would ever

in your present position that you do not feel that you could ever vote for death in this case?

A. That's true.

Q. Today?

A. No.

Q. But in the future perhaps?

A. I would say so personally that there's a chance.

Q. Exactly. And now in light of the fact—from what you have said I take it that if you had to answer those three questions, that it wouldn't make any difference to you?

A. It would not.

Q. Because you realize that three yeses would mean death?

A. Yes, I realize that.

[VD 4457] Q. And would I be correct in saying that because of your present feelings that you could not give us any assurance that you would ever personally be able to answer those three questions yes because you know if you do that that would sentence a man to his death. Am I correct about that?

A. Right now, yes.

Q. Right now. In other words, right now because of the way that you feel you could not assure us that you would answer all three questions yes?

A. I don't think at this particular time. I say this particular time.

THE COURT: In your life?

MR. GIUFFRIDA: Maybe six months or a year or so. That I honestly can't say. I honestly feel that I could not give a sentence, or answer some way, where it would commit someone to death. I just don't think I could do it.

Q. (By Mr. Scott) And do you feel pretty strongly about that right now?

A. Right now I do, yes.

Q. And your feelings right now are such that you would have to vote in such a way as to vote——

A. I don't think I could give the death penalty [VD 4458] right now.

Q. Again, is it a matter of knowing nothing for sure?

A. Right.

Q. Fair enough. Now, I think one last thing. Because you are uncertain personally and presently about how you feel,

would it be fair to say that you could not tell us, you could not assure us that your feelings about this automatic death sentence would not affect your deliberations on any issues of fact? In other words, that because of your feelings, I take it that they could affect your deliberations?

A. Uh-huh, yes.

Q. And, therefore, I take it, and you tell me whether I'm right or wrong, I take it in your present way of feeling that you could not state under oath that the mandatory sentence of death or imprisonment, life imprisonment, would not affect your deliberations?

MS. JAMES: I object. He's leading the witness. I object to the way it's raised.

THE COURT: Restate your question.

Q. (By Mr. Scott) From what you told me—you told me—the mandatory penalty of death or imprisonment for life will not affect your deliberations on any issue of fact? From what you have told me, my impression is that [VD 4459] you could not take such an oath, because you don't know how you feel. Would that be fair?

A. That would be fair right now.

Q. Right now, the way you feel is that your feeling about sentencing someone to death could darn well affect your deliberations on any——

MS. JAMES: I object. He's leading again.

A. (By the Witness) I would say so.

• • •

[VD 4461] Except the fact that we are sitting here—but what I'm trying to ask you is, you're saying that you could never on this occasion if you were selected to sit on a jury and the person on trial was found guilty of capital murder that you could never set aside your own personal feelings and follow the law and answer the three questions as questions without considering the offense of the range of punishment? Is that what you're saying?

THE COURT: Do you understand the question?

MR. GIUFFRIDA: Yeah, I think so.

Q. (By Ms. James) What is your answer?

A. I don't think I could actually give it.

• • •

[VD 4492] PENNY L. McDONALD

• • •

[VD 4496] [By Assistant district attorney Winfield Scott]:

Would you tell us how you honestly personally feel?

A. I don't believe in capital punishment.

Q. You don't?

A. No, I don't.

Q. And so you would be in the group that is flat against it?

A. Yes.

• • •

[VD 4497] I take it that your feelings are so strong that you could never vote for the death penalty?

Ms. JAMES: I object. He is leading, Your Honor.

THE COURT: Don't lead.

Q. Could you ever——

A. It would have to be a very serious crime, and I feel that this is no more important than the death of anyone else.

Q. That particular offense, murder of a police officer, is not one of the ones that you personally could ever vote death on?

A. No.

Q. And am I correct, in your way of thinking, in the murder of a police officer, no matter how aggravated the facts were, you personally could never vote for death?

A. It would have to be very aggravated. I would have to be thoroughly convinced that it was a very, very aggravated act.

Q. Let me go back to square one.

You told us that you were against the death penalty.

A. Yes.

[VD 4498] Q. Well, are you against it but in some cases you could give it or are you just flat against it?

A. I couldn't give it in some cases.

Q. And you say that the murder of a police officer is or is not one of the kinds of cases that you might be able to give?

A. Well, it could be.

Q. Now, when you say very, very aggravated, you understand this indictment does not allege the murder of a squad car full of police officers or a police station full of police officers. It alleges the murder of one police officer.

Now, I don't know—I'm trying to sort of probe around and determine what you mean by being very, very aggravated. Do you mean a multiple murder?

A. No.

Q. It does not have to be murder of one police officer?

A. Yes, it could.

• • •

[VD 4506] THE COURT: I'm sorry. When you say you're against capital punishment, are you saying that you're against it period, or are you against it in most cases or I don't quite understand what you're saying.

Ms. McDONALD: I'm against it as far as ever being personally concerned with it. Reading the paper or reading anything—I'm against it as far as that goes.

THE COURT: Well, are you saying that even though you're against it, since it is a law, that you could serve on a jury and vote for it if the facts were proper?

Ms. McDONALD: Yes, I could.

Q. (By Mr. Scott) I understand your position now. It's a matter of the facts and circumstances and if the proper facts came along to your way of thinking, you could vote for death?

A. Yes, I could.

• • •

[VD 4529] Q. (By Mr. Scott) Would your feelings affect the way that you deliberated the issues of fact in the case?

A. Yes, I think anyone's feelings would.

[VD 4530] Q. I'm not arguing with that. Would the mandatory sentence of death or life affect your deliberation on the issue of guilt or innocence?

A. Not the guilt or innocence. If the man is guilty, he's guilty, and the next step is the next step.

Q. You say it would on the three questions?

A. Might. I don't know. Like I said before, I would have to hear all of the circumstances and all of the facts. I think anyone who sat back there, even they told you emphatically—would inject their own feelings.

• • •

[VD 4535] In other words, would the question of life or death affect your deliberations on the fact issues in the case?

Now, if you can assure us of that, that would not affect your deliberations, then you are qualified. If you cannot give us that assurance, you are not qualified. Does that help you understand?

Ms. McDonald: I don't know if I could find him guilty unless the circumstances, evidence, you know, was right—I could do it if I felt strongly about it.

• • •

[VD 4542] Q. We need to know how you feel now, not how you might feel. In other words, are you in a frame of mind right now where if you were convinced he is guilty, you would find him guilty, and if you're convinced the answer to the three questions should be yes, even though by answering them yes, you know he is going to get death, and you don't think he ought to get death, what would you do?

A. I wouldn't answer the three questions yes unless [VD 4543] I felt he deserved death from the facts, and I can't consider the facts until I have heard them, and then I might change my mind. I can't say what I would do until I know the facts.

Q. Would you, if you thought the facts meant the questions should be answered yes, and yet your feelings told you he should not get death, would your conscience require you to misanswer one of the questions?

A. No.

Q. So you would set aside your conscience?

A. Yes, I would.

• • •

[VD 4550] Q. (By Mr. Scott) We got so balled up in this other thing that I never got back to the oath.

You understand that we, as prosecutors, have to disqualify jurors if he or she states under oath that the mandatory sentence—life imprisonment, or death; will not affect his or her deliberations on any issue of fact.

Now, are you able to give us that assurance now?

A. I don't know. I don't know. It goes back to so many things. I don't know if I can.

[VD 4551] The Court: Do you have reservations in your mind about it?

Ms. McDonald: Yes, I have a reservation about my ability.

Q. (By Mr. Scott) So at this point, you're not prepared to take such an oath?

A. No, I don't want to.

• • •

[VD 4552] Q. (By Ms. James) I think you answered—well, [VD 4553] you said several things. You answered that in the guilt or innocence phase that it would depend on the facts and circumstances, but that you could, in a proper case, vote for the death penalty, if the facts and circumstances require the answer to be yes to those questions.

A. Yes, I could.

Q. All right, then there is no question in your mind that you could do it?

A. Right now there is not, but I don't know about when I get back there and about when I have heard all of the facts.

Q. Well, you see, we are not asking you to commit that yes, I will vote yes on the answers. We are not asking you to vote yes or no.

All I'm asking is that if the three questions arise in the course of the trial, can you vote?

A. Yes.

Q. And you can vote about the death penalty or the life sentence, whatever?

The Court: Don't lead the juror. Rephrase your question.

Q. (By Ms. James) It would not affect, I take it, from your answer that it would not affect your deliberations in the guilt or innocence phase of the trial? If you will give us that assurance——

[VD 4554] Mr. Scott: I object. Leading.

The Court: Sustained.

Q. (By Ms. James) The question is, would it or would it not affect your deliberations on the guilt or innocence phase of the trial? Or on the answer to the three questions as questions—as individual questions, if you knew that the penalty was either life or death.

A. I don't think that it would.

Q. Is it a possibility?

A. I can't be any more specific. I don't know until I get back there. I don't think that it would. Right now it wouldn't. Right now I can say that. If the prosecutor proves

it to me beyond a reasonable doubt—beyond a shadow of a doubt then I will find him guilty. If I will answer them yes, that will be that. That's the way I feel right now.

Q. I'm not asking you to prejudge about what the facts and circumstances that might come up. We can't do that. We can't suggest that.

Right now, can you or can you not take the oath that you would not be affected——

A. (interposing) I don't know. I don't know that I can give you that oath. That's just what I told Mr. Scott. I dont' know.

I know right now I feel like if the facts were [VD 4555] right, I could do it.

I don't know how I'm going to feel after I've heard the facts.

Ms. JAMES: I submit she is qualified.

THE COURT: Do I understand that what you're saying is that you cannot assure us that you cannot give us your assurance under oath that the man's punishment, life or death, would not affect your deliberations on the fact issues in this case?

Do I understand what you're saying, is that you're not able to assure us of that?

Ms. MCDONALD: Right now I could, but I don't know if that would hold up when the time came, and I don't want to give my assurance. I don't want to put the Court in that position.

THE COURT: Can you assure us that on the mandatory punishment of death or life, will not affect your deliberations on the fact issues in the case?

Ms. MCDONALD: Not in the future I can't.

THE COURT: In other words, you can't give us your assurance now, and say, next week [VD 4556] or the week after that when you're deliberating this case, that you cannot now assure us that you will not be affected in deliberating upon the fact issues; that the maximum punishment would not affect your deliberations? Is that what you're saying?

Ms. MCDONALD: That's correct.

Ms. JAMES: May I respectfully object to the Court's leading interrogation, and I would further like to question the juror some more.

Q. (By Ms. James) Now, I'm not asking you to foresee

everything that you might do in the future, but I would like to know whether or not—of course, you do not know your own mind sufficiently to be very certain of what—in fact, absolutely certain. This you do or do not know. Of course, you do not know about decisions you might make in the future.

You understand that I'm not asking you to prejudge a case. I'm asking you to tell me what you know that you would be able to do. Even though it might be a week or two before we get to that point.

I think we understand each other now.

We are having semantic problems now.

MR. TOKLEY: I object to Ms. James' [VD 4557] narration of "semantic problems".

THE COURT: Overruled.

A. (By the Witness) I don't know if I could do it in two weeks, a month, or three weeks. After being subject to the testimony and the facts, I don't know. I can't take an oath today saying that I will. I won't take an oath saying that I will.

Q. That's because I gather that you're being very careful before you actually commit your ability to take an oath at this point. I don't know what might happen in the future. Facts and circumstances might arise, but I'm not asking you to just imagine any situation. I'm asking you what frame of mind that you're in right now? You know your own stability. Are you stable sufficiently enough to be able to assure us that your deliberations would not be affected, as you have stated they are right now?—Unaffected by anyone?

A. I can't say they won't be affected in two weeks, if it gets that far to the punishment. I can't say. I can't tell the prosecutor that yes, I will, without a doubt in my mind, if I find him guilty, and I answer those three questions yes, I will say yes, he should go to the electric chair, and I can't tell you that I won't do it.

• • •

[VD 4559] Q. (By Ms. James) Can you take an oath——

A. (interposing) I can take an oath. I can't take that oath and be honest about it. I can take an oath and do what I want to do. I can't take an oath and tell y'all that I'm going to knock out the whole fact that the death penalty is involved

in it, because I don't know when I get there. I don't know the facts or anything. The facts may prove that I could do it, and I would do it and vote for the death penalty.

[VD 4560] Q. To keep an open mind, that's all we are really asking you to do.

A. You're asking me to take an oath, and I can't take an oath.

• • •

[VD 4563] [By defense counsel James]:

it's my understanding that you have said several times that you could answer the questions independently of any feelings that you might have at this time about the death penalty or life imprisonment?

A. Right now, I don't—I don't know.

I cannot take an oath that I will do that, and I can't do that. I just can't.

I just don't feel that strong. I don't feel that strongly about it. I just don't think I can take an oath. I can't take an oath and really sit back there and do that.

• • •

[VD 4566] Q. (By Ms. James) That's what I'm attempting to do. The statute says the prosecutor should inform the jury that a juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact. That means answers to questions. It does not mean your feelings.

A. My feelings could affect the way that I answer the questions. My feelings could answer the way that I interpret the evidence, and I don't know what my feelings are going to be.

I cannot take an oath and say my feelings will not be affected as to what happens.

• • •

[VD 4567] [By defense counsel James]:

And then after you have listened to all of the evidence and made a decision as to the guilt or innocence, then, and only then, could you answer the three questions, after you have heretofore laid your own feelings, [VD 4568] your preconceived feelings about the mandatory sentence?

A. I don't know that, and because I don't know I cannot take an oath saying that I will. That's what the prosecutor wants. I can't give that oath. I can't give anybody that oath. I can't honestly say that. I could say that I could raise my hand and take the oath, but to get back there, I know that it would affect me.

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[VD 4920] DOROTHY G. RIDDLE

• • •

[VD 4922] [By Assistant district attorney Steve Tokley]:

Now, I want to ask you, knowing all of that, I want to ask you what are your feelings about the death penalty?

A. Well, I feel like—if I felt like, myself, that, you know, would justify what he's done that I probably could.

Q. You probably could?

THE COURT: Would you pull that microphone up a little higher? Thank you.

[VD 4923] Well, that's all right. Okay.

JUROR RIDDLE: Okay. I'm sure I know—at the same time—but I just feel—I don't know how to answer it except that I could, I'm sure, if I felt like it was—

Q. (By Mr. Tokley) Let me put this on a real personal basis to you. Try to put it in the light that it would be in. I think the question really boils itself down to if—could you sit on this jury and if you found the Defendant guilty as charged, could you make decisions that, if the facts and circumstances called for it, would result in this man's death. That's what it really boils down to. We have to know now whether you could or you couldn't.

Ms. JAMES: Your Honor, I object to the phraseology of, resulting in this man's death.

THE COURT: Overruled.

Q. (By Mr. Tokley) Go ahead.

A. Yes.

Q. Do you have any doubt about that at all?

A. No, after listening to it, I'm sure I could.

• • •

[VD 4925] May I assume then—may I take it from that answer that you don't have any quarrel with the death penalty?

A. No.

Q. You believe in the death penalty?

A. Right.

Q. But you just personally could not sit on a jury yourself and be involved in making decisions that would result in the death penalty. Am I correct in that?

A. Well, I think after hearing a case or going through it, I could. Just at the moment it's just such a big decision for me to say yes or no to.

• • •

[VD 4928] You tell me how you feel at this point.

A. Well, I guess I feel that I do believe in it,

Q. Sure.

A. But, of course, the way I feel right now—it would be a big—it would be hard for me to do it, and then I wonder how I would feel afterwards.

Q. Some people it would just—some people it would just—it would just violate their conscience.

A. Uh huh.

Q. And this we don't want to do, and that would be unfair to you and it would be unfair to those of us who participated in the case, certainly unfair to the Defendant.

So, I just—I will ask you the question again. Do you feel like that you could personally serve on this jury, and if the facts and circumstances [VD 4929] called for it, make decisions, personally make decisions that would result in this man's death?

A. I would just say no.

• • •

[VD 4933] Q. Now, I just want to ask you based upon the reservations that you have indicated about even though you—even though you have no quarrel with the death penalty, you have indicated that as far as your personal service was concerned you don't feel like you could do it? Would the mandatory sentence of death or life affect your deliberations on any of the fact issues of the case?

A. I don't think after going that far and hearing all the evidence that if I felt like all the answers should be yes, I don't think it would,

[VD 4934] Q. All right. You say you don't think that it would? Let me just tell you what the Statute requires. I

will just—in no uncertain terms—to be qualified to serve on the jury like this you have to be able to assure us in no uncertain terms that the mandatory sentence of death or life would not—not probably wouldn't or might not, but would not affect your deliberations on any of the fact issues in the case.

Now, either you can tell us that or you can't tell us that, and this is where you have to let us know, and if you have serious reservations about it then you need to let us know that. But can you unequivocally tell the Court and the lawyers that the mandatory sentence of death or life will not affect your deliberations on any of the fact issues of the case? Can you say that under oath or can you not say that?

A. That would not affect me. That—I would say yes, I could do that after all the—

Q. You are saying that the mandatory sentence of death would not affect you?

A. No.

Q. Okay. Are you sure about that?

A. Yes.

Q. Okay. You are sure about that in spite of [VD 4935] the reservations that you earlier had?

A. Yes.

Q. So, you are saying then, that if you were selected on this jury and if you were convinced that the Defendant was guilty and if you were convinced that the evidence indicated that the proper answer to the three questions was yes that you could answer all three questions yes knowing full well that it would result in this man's death. Can you tell us that?

A. Yes, until you said it that way.

Q. That's the way it is. We are not talking about in the abstract. We are not talking about some philosophical solution.

A. I know it.

Q. We are talking about a real live case and real life decisions that could, if the facts and circumstances called for it, result in a real person's death. And don't feel like—don't feel like you have to prove something to yourself or to us by saying I can do it.

A. Yeah.

Q. If you honestly feel like you can't do it, then you are a much better citizen for telling us than leading yourself

and leading us to think that you can and then having these horrible doubts that linger all [VD 4936] the way through the trial.

MS. JAMES: I object to this tutoring of the witness. I think she expressed her views very adequately and unequivocally.

THE COURT: Overruled.

MS. JAMES: And that she's qualified.

THE COURT: You are overruled.

Q. (By Mr. Tokley) Okay.

A. I will say no just like the first time.

Q. Okay. So, then—and I'm not trying to get you to do something, but I'm trying to put you in the situation that you are really in and I feel like it's out of fairness to you that I'm doing that as much as for us.

A. Yes, I understand that.

Q. Are you saying that the mandatory sentence of death or life would affect your deliberations on the fact issues in the case?

A. Yes.

Q. Is that what you are telling us?

A. Yes.

Q. All right. Now—

MS. JAMES: Leading, Your [VD 4937] Honor. The question was leading.

THE COURT: Overruled.

Q. (By Mr. Tokley) Mrs. Riddle, I know you are struggling with this, and I appreciate your honesty and I appreciate your frankness, but is that really the way you feel when it gets down to it?

A. Yes, sir.

Q. You simply could not tell us under oath that the mandatory sentence of death or life would not affect your deliberations?

MS. JAMES: Leading, Your Honor.

A. (By Juror Riddle) No, I could not tell you that.

THE COURT: Overruled.

Q. (By Mr. Tokley) Because it would—

A. Yes.

Q. Are you sure about that?

A. Yes.

• • •

[Rec. 163]

JUDGMENT—PLEA OF NOT GUILTY

THE STATE OF TEXAS	IN THE CRIMINAL DISTRICT
vs.	COURT NO. 2 OF DALLAS COUNTY,
RANDALL DALE ADAMS	TEXAS
	APRIL TERM, A.D., 1977
	No. F-77-1286-I
	April 26, 1977

THIS DAY this cause was called for trial, and the State appeared by her Criminal District Attorneys Douglas Mulder, Stephen Tokoly and Winfield Scott, and the Defendant RANDALL DALE ADAMS appeared in person, his Counsel Edith James and Dennis White also being present, and both parties announced ready for trial, and the said defendant in open Court after having been duly and legally arraigned pleaded "Not Guilty" to the charge contained in the indictment herein; thereupon a jury, to-wit: Mrs. Douglas Fain, foreman, and eleven others, was duly selected, impaneled and sworn, who having heard the indictment read, and the Defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, retired in charged of the proper officer to consider their verdict, and afterwards were brought into open Court, by the proper officer, the Defendant and his counsel being present, and [Rec. 164] in due form of (*sic*) returne (*sic*) into open Court the following verdict, which was received by the Court, and is here now entered upon the minutes of the Court, to-wit:

> "We, the jury, find the defendant guilty of Capital Murder, as charged in the indictment."
>
> */s/ Mrs. Douglas Fain*
> *Foreman*

Thereupon further evidence being heard by the jury on the special issues pertaining to punishment the Court again charged the jury as provided by law on the following special issues: Special Issue I: "Was the conduct of the defendant that caused the death committed deliberately and

with the reasonable expectation that the death of the deceased or another would result?"

Special Issue II: "Is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?"

Special Issue III: "Was the conduct of the defendant in killing the deceased unreasonable in response to provocation, if any, of the deceased?"; and the jury after hearing argument of counsel, retired in charge of the proper officer to consider their verdict and afterwards were brought into open Court by the proper Officer; the Defendant and his counsel being present and in due form of law returned into open Court the following verdict, which was received by the Court and is here and now entered upon the minutes of the Court, to-wit:

> We, the jury, unanimously find and determine beyond a reasonable doubt that the answer to Special Issue I is "yes."
>
> */s/ Mrs. Douglas Fain*
> *Foreman*

> We, the jury, unanimously find and determine beyond a reasonable doubt that the answer to Special Issue II is "yes."
>
> */s/ Mrs. Douglas Fain*
> *Foreman*

> We, the jury, unanimously find and determine beyond a reasonable doubt that the answer to Special Issue III is "yes."
>
> */s/ Mrs. Douglas Fain*
> *Foreman*

IT IS THEREFORE CONSIDERED AND ADJUDGED BY THE COURT, that the said Defendant is guilty of the offense of Capital Murder, A Capital Felony, as charged in the indictment; and that the said defendant committed said offense on the 28th day of November A.D., 1976; as found by the jury, and the jury having answered "yes" to the [Rec. 165] three Special Issues, the Court set the punishment at Death; and that the State of Texas do have and

recover of the said Defendant all costs in this prosecution expended, for which execution will issue; and that the said Defendant is remanded to the Sheriff of Dallas County to await the further order of the court herein.

D. MITWAY
Judge, Criminal District Court No. 2
Dallas County, Texas

WHEREAS, on the 20th day of May, 1977, the Defendant, RANDALL DALE ADAMS in said cause, gave notice of appeal to the Court of Criminal Appeals at Austin, Texas.

Filed in the Criminal District Court No. 2 of Dallas County, Texas, on April 26, 1977.

/s/ D. Metcalfe

COURT OF CRIMINAL APPEALS OF TEXAS,
En Banc.

RANDALL DALE ADAMS, *Appellant,*

v.

THE STATE OF TEXAS, *Appellee.*

No. 60037.

Jan. 31, 1979.

Rehearing En Banc Denied

March 21, 1979.

Defendant was convicted in the Criminal District Court, No. 2, Dallas County, Don Metcalfe, J., of capital murder, and he appealed. The Court of Criminal Appeals, Dally, J., held that: (1) trial court did not err in refusing to admit evidence of extraneous criminal offenses committed by State's chief witness; (2) prosecutor did not improperly withhold statement made to police by witness; (3) trial court did not erroneously refuse to permit defendant to ask venire members certain questions during voir dire, and (4) evidence was sufficient to support jury's affirmative answer to second punishment issue.

Affirmed.

Melvyn Carson Bruder, J. Stephen Cooper and George A. Preston, Dallas, for appellant.

Henry Wade, Dist. Atty., W. T. Westmoreland, Jr., Douglas D. Mulder and Winfield Scott, Asst. Dist. Attys., Dallas, for the State.

Before the court en banc.

OPINION

DALLY, Judge.

This is an appeal from a conviction for capital murder. The punishment was assessed at death.

Appellant's brief contains forty grounds of error in which he contends that: (1) the trial court erred in refusing to

admit evidence of extraneous criminal offenses committed by the State's chief witness, David Harris, and in restricting appellant's cross-examination of another State witness, Teresa Turko; (2) the prosecutor improperly withheld a statement made to the police by witness Emily Miller; (3) the trial court erroneously refused to permit appellant to ask venire members certain questions during voir dire, and excused some venire members for cause in violation of the rule of *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); (4) Art. 37.071, V.A.C.C.P., is unconstitutional; and (5) the evidence is insufficient to support the jury's affirmative answer to the second punishment issue.

Appellant was found guilty of the murder of Dallas police officer Robert Wood, who was fatally shot by the driver of an automobile he had stopped for failing to have on its headlights. The shooting occurred at approximately 12:30 a.m. on November 28, 1976, in the 3400 block of North Hampton Road in Dallas.

The State's principal witness was David Harris, who at the time of the offense and trial was sixteen years of age. Harris testified that he ran away from his home in Vidor on November 26, 1976, after stealing money and a car from the house of a neighbor. He also took with him a .22 caliber pistol and ammunition.

Harris drove to Houston, where he spent the night in a shopping center parking lot. On the morning of November 27, Harris drove to Dallas. In Dallas, Harris picked up appellant, who was hitchhiking. Harris and appellant spent the afternoon and evening of November 27 riding around Dallas in the car Harris had stolen, smoking marihuana and drinking beer. That night they went to a drive-in movie.

Harris and appellant left the movie at approximately midnight. Appellant was driving. As they drove south on the street Harris later identified as Hampton Road toward the motel at which appellant was living, they were stopped by a police patrol car. Harris, fearing that he would be identified, slumped down in the front seat so that he would not be seen. As the officer, Robert Wood, approached the driver's window of the car, appellant reached under the front seat where he knew the pistol was located, removed

the pistol, shot the officer several times, and rapidly drove away.

After the shooting, appellant drove to his motel, where he and Harris separated. Harris spent the rest of the night in a parking lot, and then returned to Vidor. Harris spent the next several days with friends, to whom he stated that he had shot a Dallas police officer. Harris testified that he made this claim in an effort to impress his friends. Harris was arrested on December 5, 1976, for the theft of the car and was released to the custody of his parents. He was rearrested on December 20, after the Vidor police learned of the incriminating statements he had made with regard to the Dallas murder. Following this arrest, Harris gave a statement detailing his activities in Dallas and identifying appellant as the person who shot Wood.

Appellant, in his testimony, admitted spending the day of November 27 with Harris. But appellant claimed that he and Harris left the movie at approximately 9:30 p.m. and that they separated at a convenience store next door to his motel. Appellant testified that he returned to his motel room no later than 10:00 p.m. and was asleep there at the time of the murder. Appellant's defensive theory was that Harris had shot Wood and was attempting to shift the blame to him.

Pursuant to a motion in limine filed by the State and granted by the trial court, evidence concerning extraneous offenses committed by Harris was first elicited outside the presence of the jury in order that a determination as to its admissibility could be made. Through Harris' own testimony and that of other witnesses, it was established that Harris had committed several burglaries and a car theft during 1975. It was also established that Harris had been adjudicated a juvenile delinquent following another burglary in April, 1976, and was on juvenile probation at the time of appellant's trial. The trial court ruled that this testimony was admissible, and it was subsequently introduced before the jury. However, the trial court refused to permit the introduction of testimony concerning a burglary and a robbery committed by Harris on December 4 and 5, after his return to Vidor from Dallas. We shall hereafter refer to these offenses as the "December offenses."

Testimony concerning the December offenses was elicited

from five witnesses. Harris admitted participating in both offenses. Lynn Brown and Randy Hayes, two of the friends with whom Harris was staying at that time, also testified that Harris committed these offenses. Jim Sharon Bearden, the County Attorney of Orange County, and James Jenkins, the Assistant County Attorney, testified that offense reports had been filed in their office with respect to these offenses and that a petition to revoke Harris' probation had been prepared but not filed. Bearden and Jenkins also stated that no decision had been made whether to prosecute Harris as an adult for the offenses. Appellant contends that this testimony was admissible to establish Harris' bias and motive for testifying against appellant.

In general, unadjudicated criminal offenses may not be used to impeach a witness in a criminal case. Art. 38.29, V.A.C.C.P. However, evidence of pending charges against a witness is admissible under certain circumstances for the limited purpose of showing bias, prejudice, interest, and motive of the witness in testifying as he did. *Randle v. State,* 565 S.W.2d 927 (Tex.Cr.App.1978); *Castro v. State,* 562 S.W.2d 252 (Tex.Cr.App.1978); *Evans v. State,* 519 S.W.2d 868 (Tex.Cr.App.1975); *Kissinger v. State,* 126 Tex.Cr.R. 182, 70 S.W.2d 740 (1934). See also *Simmons v. State,* 548 S.W.2d 386 (Tex.Cr.App.1977). Appellant argues that the failure of the Orange County authorities to take any action against Harris based on the December offenses affords the basis for an inference that a bargain had been made with Harris in exchange for his testimony. See *Burkhalter v. State,* 493 S.W.2d 214 (Tex.Cr.App.1973).

An examination of the record reveals that appellant failed to preserve error with respect to the testimony of Bearden and Jenkins. After questioning both witnesses outside the presence of the jury, as required by the motion in limine, appellant failed to secure a ruling by the trial court on the admissibility of their testimony regarding the December offenses. Appellant may not complain on appeal of the exclusion of testimony in the absence of an offer of the testimony and a ruling by the trial court excluding it from evidence. *Norman v. State,* 523 S.W.2d 669 (Tex.Cr.App. 1975); *Duran v. State,* 505 S.W.2d 863 (Tex.Cr.App.1974).

Appellant did obtain rulings from the trial court excluding from evidence the testimony of Harris, Brown, and

Hayes concerning the December offenses. However, in arguing for the admission of their testimony, appellant's trial counsel did not raise the contention now made on appeal. The contention made before the trial court was that the evidence concerning the December offenses showed that Harris was on a criminal spree during the time period in question, and that Harris had a propensity to blame others for his own criminal conduct. The following excerpt illustrates the argument made by appellant's counsel:

"THE COURT: Mr. White, I would like to know now, not talking about his criminal activities prior to the shooting of the police officer, I would like to know how the later commission of a burglary and a robbery by [Harris] is material to this case?

"MR. WHITE: Your Honor, I believe that our defense being that this witness—well, by his own witness is an accomplice but—that it will—that he is the perpetrator of the crime and I believe that the evidence will show he was on a criminal spree and he was committing one crime after the other.

"THE COURT: In other words, you want to show he is a criminal generally, is that right, is that it?

"MR. WHITE: Not just a criminal generally, but it's the specific time span from November 26th to December 19th that he was on a criminal spree committing a series of related crimes.

* * * * * *

"MR. WHITE: I believe that I have elicited from this [witness] that in relation to the burglary that he was the one that went into the residence, to the trailer and yet upon his arrest he implicated Frank Nelson, Hootie Nelson and Lynn Brown who were not people that went into the residence.

"That in the commission of the robbery he held the rifle, went inside the convenience store, committed the robbery and yet upon his being arrested and giving a statement he implicated two other participants that were not directly—

"THE COURT: It's—

"MR. WHITE: He has a propensity of committing crimes and blaming it on the closest person at hand."

Not only did appellant fail to urge the admission of the December offenses on the ground now urged before this

Court, he made no effort to pursue the question of Harris' bias and motive during the trial. The fact that Harris was on juvenile probation was in evidence. It was also established that by stealing his neighbor's money and car and leaving Orange County Harris had violated the terms of his probation. It was also apparent from Harris' description of the events of December 27 and 28 that he was a prime suspect in Wood's murder. Despite the presence of this evidence, appellant did not cross-examine Harris with regard to the existence of any agreement he may have had with the State, nor was Harris asked any questions regarding his motive for testifying against appellant. Appellant did not call County Attorney Bearden to testify before the jury, and in his questioning of Assistant County Attorney Jenkins, appellant made no inquiry into the existence of any understanding between his office and either appellant or the Dallas District Attorney.[1] We hold that the refusal of the trial court to admit testimony concerning the December offenses was not an abuse of discretion in light of appellant's failure to inform the trial court that the testimony was sought to show bias or motive, and the absence of any attempt by appellant to show that Harris' testimony had been prompted by the promise or hope of favorable treatment. *Cloud v. State,* 567 S.W.2d 801 (Tex.Cr.App.1978); *Garza v. State,* 532 S.W.2d 624 (Tex.Cr.App.1976); *Luna v. Beto,* 395 F.2d 35 (5th Cir. 1968).

Officer Teresa Turko was Wood's partner. Turko testified that she was standing near the right rear corner of the assailant's car at the time Wood was shot and that she saw only one person in the car. Turko could not identify this person since she saw only the back of his head, but she did testify that appellant's hair was the same color and worn in the same style as that of the man in the car. Turko also testified that Harris' hair was not similar in either color or style to that of the man she saw.

Outside the presence of the jury, Turko testified that an internal affairs investigation of her conduct on the night of the shooting was conducted by the Dallas Police Department after questions were raised as to the truthfulness of

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[1] Harris, Bearden, and Jenkins each testified, in response to questions by the prosecuting attorney outside the presence of the jury, that no promises or agreements had been made by the State in exchange for Harris' testimony.

her original report. Although she was not formally suspended, Turko was relieved of her duties for ten days while this investigation took place. As a result of the investigation, the charges against Turko were determined to be unfounded.

The trial court initially granted the State's motion in limine prohibiting appellant from introducing evidence of the investigation of Turko's conduct. Appellant contends that the trial court erred by restricting his cross-examination of Turko in this manner. However, during appellant's cross-examination of Turko, the following exchange took place relative to the report Turko had filed pursuant to the investigation:

"Q. Did you make a further statement in connection with the Police Department investigation of the killing of Robert Wood?

"A. Yes, sir, I did.

"Q. Was that statement made by you on the 9th day of December, 1976?

"A. Yes, sir.

"Q. Did you state at the beginning of that affidavit that 'I will also cover the additional allegations that have been surfaced since the shooting incident'?

"A. Yes, sir.

"THE COURT: Let me see you around the side of the bench, Mr. White, Mr. Mulder.

* * * * * *

"MR. MULDER: He can put the whole thing in as far as I'm concerned. I don't want to argue about it any more. He can put the whole thing in.

"MR. WHITE: I'm in agreement that parts of this are appropriate and parts are not. I would like to examine which parts are appropriate.

"THE COURT: Go ahead with your questions.

"MR. WHITE: I would like to take a few moments and—

"MR. MULDER: Judge, I don't have any objection to it and don't have any motion. As far as I'm concerned he can put the whole thing in.

"THE COURT: Are you offering the whole thing?

"MR. WHITE: No, I'm not, I'm not, Your Honor. I'm trying to abide by the terms of previous motions.

"THE COURT: What is it you want to do now, Mr. White?

"MR. WHITE: I'm trying to get Mr. Mulder to identify parts that comply with his motion. I'm going to introduce those parts only.

"THE COURT: Well—

"MR. MULDER: I'm withdrawing any motions, you can put anything you want to put in.

"THE COURT: He said he is—

"MR. MULDER: I'm withdrawing that. Put it all in if you want to."

Despite the withdrawal of the State's motion in limine, appellant did not question Turko concerning the internal affairs investigation. Although appellant was given the names of the officers who conducted the investigation, he did not call these officers as witnesses. We hold that the failure of appellant to offer evidence concerning the internal affairs investigation after the State withdrew its motion in limine waived any objection he might have had to the initial exclusion of this evidence. *Jackson v. State,* 552 S.W.2d 798 (Tex.Cr.App.1976); *Johnson v. State,* 527 S.W.2d 525 (Tex. Cr.App.1975).

Three witnesses testified that they drove past the scene of the shooting after the assailant's car had been stopped but before Wood was shot. Emily and Robert Miller testified that they saw only one person in the suspect car and identified appellant as that person. Michael Randall testified that he saw two people in the suspect car and identified appellant as the driver.

Each of these witnesses gave a written statement to the police soon after the shooting. In Emily Miller's statement, she describes the assailant as "a Mexican or a very light skinned black man." Appellant contends that, since he is neither black nor of Mexican descent, this prior statement was relevant to the issue of Emily Miller's credibility and that the prosecutor improperly withheld the statement in violation of the rule of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Appellant learned of the existence of Emily Miller's statement when, three days after she testified and after appellant had waived her further appearance, appellant's trial counsel asked the prosecutor to see the written statements of the three identification witnesses. At this point in the trial, both sides had rested and Emily Miller had moved to an

unknown address believed to be in Illinois. Given the uncertainty as to whether and when Emily Miller could be located the trial court refused appellant's request to introduce her statement into evidence.

Prior to trial, appellant filed a motion for the disclosure of evidence favorable to the accused in which he requested, among other things, the statements of witnesses. Appellant contends that the failure of the prosecutor to comply with this motion with respect to Emily Miller's statement denied him due process of law, citing *Crutcher v. State,* 481 S.W.2d 113 (Tex.Cr.App.1972). In *Crutcher,* a burglary conviction was reversed because of the failure of the prosecutor to reveal a police offense report that contained a description of the burglar by the State's chief identification witness. This description was basically inconsistent with the appearance of the defendant. We held that the existence of this inconsistent description was relevant to the witness' credibility and that the prosecutor violated his duty under *Brady v. Maryland,* supra, when he knowingly failed to reveal the existence of the offense report despite an attempt by the trial court, at the hearing to determine the admissibility of the witness' in-court identification, to determine if there were any discrepancy between the witness' description of the burglar and the actual appearance of the defendant.

A defendant is entitled to examine the written statement of a witness for purposes of cross-examination upon demand made *after* the witness has testified on direct examination. *Gaskin v. State,* 172 Tex.Cr.R. 7, 353 S.W.2d 467 (1961). The distinction between the general *Brady* rule and the more specific *Gaskin* rule was discussed in *Rayne v. State,* 516 S.W.2d 675 (Tex.Cr.App.1974), in which the defendant complained of the prosecutor's failure to disclose the statements of the State's witnesses prior to trial:

"Reliance is primarily made on *Brady v. Maryland,* [supra], which is limited to suppression of exculpatory evidence by the prosecution to an accused upon request as being a violation of due process. Several federal jurisdictions favor pre-trial disclosure of evidence subject to the *Brady* doctrine. [Citations omitted.] Despite the announced policy in these federal jurisdictions, the legislative policy of Texas is to the contrary. Art. 39.14, V.A.C.C.P., specifically excepts written statements of witnesses from pre-trial discovery. We do not feel compelled to expand upon the rule

followed in this State since the procedure of disclosing such evidence at trial affords the appellant an opportunity to request a postponement or continuance which adequately satisfies due process requirements of *Brady v. Maryland,* supra."

A defendant is entitled to examine the prior statements of a State witness only if he makes a timely and specific request to do so following the witness' direct testimony. *Mendoza v. State,* 552 S.W.2d 444 (Tex.Cr.App.1977); *Zanders v. State,* 480 S.W.2d 708 (Tex.Cr.App.1972); *Gaskin v. State,* supra. Appellant did not request to see Emily Miller's written statement until three days after she had testified. This was not a timely request, and appellant may not complain of the failure of the prosecutor to disclose the statement earlier.

Emily Miller was one of three identification witnesses. Her statement describing the suspect as a black or Mexican man was based on having seen the assailant for a few seconds as she and her husband drove past the scene. This is in contrast to *Crutcher v. State,* supra, where the sole identification witness had had a face-to-face conversation with the burglar and had soon thereafter given the police a detailed description which did not fit the defendant. The record also reveals that Emily Miller positively identified appellant in both a lineup and a photographic display. After examining the entire record, we cannot say that Emily Miller's written statement creates a reasonable doubt as to appellant's guilt. See *Frank v. State,* 558 S.W.2d 12 (Tex.Cr.App.1977); *Smith v. State,* 516 S.W.2d 415 (Tex.Cr.App.1974).

Appellant contends that the trial court erred by restricting his questioning of certain venire members, thereby preventing him from using intelligently his peremptory challenges. The necessity to question freely and broadly on voir dire in order to decide intelligently when to use one's peremptory challenges has been firmly established as a concomitant to the constitutional right to counsel. *Smith v.* State, 513 S.W.2d 823 (Tex.Cr.App.1974); *De La Rosa v. State,* 414 S.W.2d 668 (Tex.Cr.App.1967). Although the decision as to the propriety of any question during voir dire is left to the discretion of the trial court, that discretion is abused when a proper question about a proper area of

inquiry is prohibited. *Smith v. State,* supra. There is no doubt, however, that reasonable restrictions on the exercise of voir dire examination may be imposed for various reasons, among them to curb the prolixity of what can become the lengthiest part of a criminal proceeding. *Bodde v. State,* 568 S.W.2d 344 (Tex.Cr.App.1978); *Smith v. State,* supra. In the instant case, jury selection began on March 28, 1977, and did not end until April 25, after the examination of more than one hundred venire members. The transcription of the voir dire examination fills more than 5,700 pages of the record.

Appellant raises three grounds of error regarding his examination of Mrs. Willie Millhollon. The first is based on the following exchange:

"Q. (By Ms. James) All right. Now, you believe there are two sides to every story?

"A. Yes.

"Q. All right. And after the Prosecution has rendered their version, you will, of course, wish to hear the Defendant's version, will you not?

"MR. TOKOLY: Objection.

"THE COURT: Sustained. Don't answer. Ask your next question.

"MS. JAMES: Well, Your Honor, I believe this goes to the burden of proof in the right of—

"THE COURT: It's a leading question."

Appellant contends that the attitude of venire members about the accused's right not to testify is a proper area of inquiry on voir dire.

Although it is apparent that the prosecutor's objection was sustained because of the leading nature of the question, and not because of its subject matter, appellant did not rephrase the question. Furthermore, the proper inquiry is not whether the juror might wish the accused to testify, but whether the juror would, regardless of his wishes, follow the law and not consider the silence of the accused as evidence against him. *Barry v. State,* 165 Tex.Cr.R. 204, 305 S.W.2d 580 (1957). The trial court did not abuse its discretion in sustaining the objection.

While questioning Millhollon, appellant's counsel made the following statement concerning courtroom security:

"Q. And there's another matter, that during the trial—I don't know what measures exactly the Court has to secure, whether there will be searches at the door. There will undoubtedly be a large number of Bailiffs and Deputy Sheriffs entrusted with the security of this courtroom and they will be wearing badges and guns and there will be a large number of Sheriffs and other security people around the Courthouse and possibly individual searches of people coming into the courtroom.

"THE COURT: Wait a minute. Where did you get that from?

"MS. JAMES: Well, I don't know if Your Honor plans to search people or not.

"THE COURT: Then let's don't tell the jurors what I'm going to do about security when you don't know."

The statement was obviously based on speculation, and the trial court did not err in refusing to permit questions based thereon.

Finally, appellant asked Millhollon the following question:

"Q. All right. Do you have any hostile feelings toward persons whose life style differs from your own?

"MR. TOKOLY: Judge, that's so vague.

"THE COURT: Sustained."

Appellant has made no showing as to the relevance of this question, other than to assert that it "attempts to determine whether the venireman was one who is prejudiced against, rather than tolerant of, those different from herself." No abuse of discretion is shown. See *Johnson v. State,* 467 S.W.2d 247 (Tex.Cr.App.1971).

Appellant's counsel explained to venire member Leslie Goekler that appellant did not have to testify and that this could not be considered as evidence against him, and Goekler stated that he understood. Goekler was then asked:

". . . We have gone through the presentation of the evidence by the Prosecution; and at that point would you expect the Defendant to testify?

"A. No.

"Q. Well, being honest with yourself, wouldn't you want him to explain—

"MR. TOKOLEY: Objection.

"THE COURT: Sustained. Don't suggest.

"Q. (By Ms. James) Do you think he should testify? Do you think he should—

"MR. TOKOLY: Judge, pardon me. I object to this whole line of questioning because—

"THE COURT: Sustained."

Since appellant had already established that Goekler understood that appellant did not have to testify and that he would not expect him to testify, the trial court did not abuse its discretion in sustaining the objections to the subsequent, essentially duplicitous questions. *Bodde v. State,* supra; *Smith v. State,* supra; *Barry v. State,* supra.

During the voir dire examination of Raymond Wagner, it was established that he had read news stories about the shooting of Officer Wood, but that he remembered few of the details and retained no impression of the stories. Appellant subsequently asked Wagner:

"Q. Would you say that the news stories that you have read were slanted towards the side of the prosecution in this case?

"MR. SCOTT: Objection, Your Honor.

"THE COURT: Sustained.

"Q. (By Ms. James) All right. Were you changed in any of your thinking by any of the newspaper stories that you read?

"A. Well, I haven't really given it any thought.

"Q. All right. It was not a matter of any importance to you at that time?

"A. No, ma'am.

"Q. All right. Did you have an occasion to read in the newspaper any opinion of any prominent person about this case?

"A. No, ma'am."

Appellant contends that the question objected to was an "attempt to elicit the venireman's perception of the articles he previously admitted he had read and remembered." Wagner was thoroughly questioned concerning his memory of the news stories he had read, and he stated that he retained no impression of them. The trial court did not abuse its discretion in sustaining the objection. *Bodde v. State,* supra; *Smith v. State,* supra.

The following also occurred during appellant's examination of Wagner:

"Q. (By Ms. James) If after the prosecution has rendered their version and they have closed their testimony and you have heard all of their evidence and the case is then in the hands of the defense, would you expect Randall Dale Adams to testify?

"MR. TOKOLY: Objection, because the predicate has not been laid.

THE COURT: I understand. What [we] are talking about predicate is this, the ultimate issue that we are asking about is really can you follow the law as I will give it to you at the end of the trial.

JUROR WAGNER: Right, I will follow the law.

"THE COURT: If the Defendant does not testify during the trial then part of the law I will give you would be that in deliberating upon any issue in the case that you are not to consider his failure to testify as any evidence of anything, period.

"All right. You are not to discuss it, consider it or refer to it in any way during your deliberations. Now, some jurors are of the frame of mind that if the Defendant doesn't testify then they would in some way hold that against the Defendant, if they are of that frame of mind then they could not be a fair juror because they could not follow the instructions of the Court. There are some people who just couldn't follow the instructions on that. They may feel like if the Defendant doesn't testify, 'By golly I'm going to convict him,' for whatever reason.

"So Ms. James is trying to find out if the defense—Defendant does not testify in the trial if on one hand you would hold that against him or if on the other hand you could follow the Court's instruction and not consider his silence as a witness—

"JUROR WAGNER: I could follow the Court's instructions.

"THE COURT: Go ahead, Ms. James.

"Q. (By Ms. James) Well, would you want him to testify?

"MR. TOKOLY: Well, I object to that.

"THE COURT: Sustained.

"Q. (By Ms. James) Well, the Court has just given the predicate for you, you have said you would follow the law in the Court's Charge and I think that the Court would charge

you that the Defendant does not have an obligation to testify, but wouldn't you want him to testify?

"MR. TOKOLY: Objection.

"THE COURT: Well, as to whether the juror would want him to testify or not, I'm not going to allow that. Well, no, I beg your pardon. I'm going to sustain the objection. Go on to your next question.

* * * * * *

"Q. (By Ms. James) All right. Being honest with yourself wouldn't you wonder why the Defendant didn't testify?

"MR. TOKOLY: Objection.

"THE COURT: Sustained.

"Q. (By Ms. James) All right. Now, if the Court has followed—has given you the law in the Court's Charge would you wonder why he did not explain himself?

"MR. TOKOLY: Objection.

"THE COURT: Sustained.

"Q. (By Ms. James) All right. Do you think that these thoughts about why he did or didn't testify might be subconsciously affecting your determination of innocence or guilt?

"THE COURT: Do you object to that?

"MR. TOKOLY: Yes.

"THE COURT: I will allow that question provided it be rephrased to not assuming something that is not before the Court.

"Do you feel that any thoughts that you might have about why the Defendant didn't testify or for what reason he didn't testify or any thoughts like that, do you feel that any feelings you might have about it would or could be such that they would prevent you from following my instructions of not considering his silence?

"JUROR WAGNER: No, I would follow the law whatever your Instructions were.

"THE COURT: Any feelings or thoughts you might have about it I take it from what you say would not be such as it would preclude you or prevent you from being able to follow the Court's instructions?

"JUROR WAGNER: That's right.

"THE COURT: Go ahead, Ms. James."

Wagner's ability to follow the law should appellant not testify was thoroughly tested. The trial court did not abuse

its discretion in sustaining the objections. *Bodde v. State,* supra; *Smith v. State,* supra; *Barry v. State,* supra.

A similar exchange took place during the examination of Paul Matlock:

"Q. All right. Now, after the Court has charged you on the law of course that will be after the prosecution has rendered their version, would you expect the Defendant to testify?

"MR. TOKOLY: Here again—

"THE COURT: You have to lay a predicate.

"Q. (By Ms. James) Well, I think that—you know that the Defendant does not have the burden of proof, does not have to testify although he can if he wishes. Now, after the prosecution has rendered their version and after the Court has instructed you on the law would you still expect the Defendant to testify?

"A. Not necessarily.

"Q. All right. Would you think he was hiding something if he didn't testify?

"MR. TOKOLY: Objection.

"THE COURT: Sustained.

Q. (By Ms. James) Well, being honest with yourself, wouldn't you think these thoughts might subconsciously prevent you from following the Court's instructions?

"THE COURT: Don't lead your witness. Rephrase your question.

"Q. (By Ms. James) Do you think that your thoughts might subconsciously affect your determination of innocence or guilt?

"MR. SCOTT: I don't see how a person can answer that.

"THE COURT: Sustain the objection. The question is if the Defendant does not testify you will be instructed by the Court not to consider his silence as any evidence in the case. You are not to discuss it, refer to it or consider it in any way. And the question is if you are on the Jury and that occurs and you are so instructed would you follow that instruction of the Court?

"JUROR MATLOCK: Correct. Yes.

"THE COURT: Go ahead, Ms. James."

Again, no abuse of discretion is shown. *Bodde v. State,* supra; *Smith v. State,* supra; *Barry v. State,* supra.

Venire member Charles Abbott was asked:

"Q. Do you drink?
"A. Occasionally.
"Q. You have no prejudice or otherwise that would cause you to disbelieve anybody who took a drink?
"A. No.

* * * * * *

"Q. (By Ms. James) Well, would you have any bias, even though the law permits drinking, against anybody who drinks which would cause you to disbelieve part or all of his testimony?
"MR. TOKOLY: I object to that.
"THE COURT: Sustained . . ."

The last question was duplicitous; no abuse of discretion is shown. *Bodde v. State,* supra; *Smith v. State,* supra.

The following questions were asked of venire member Leo Cunningham:

"Q. All right. Now, if the Court should instruct you that silence of the Defendant is not evidence, and that he does not have to testify, and if the Court has charged you on the law and after the—this would necessarily be after the Prosecution has rendered its version, would you still expect the Defendant to testify?
"A. I don't think so.
"Q. All right. Would you want him to testify?
"MR. TOKOLY: Now, Judge—
"THE COURT: Sustained.
"MR. TOKOLY: —we object to that."

The second question was essentially a repetition of the first, and we find no abuse of discretion. *Bodde v. State,* supra; *Smith v. State,* supra; *Barry v. State,* supra.

Venire member Lester Hutchings was asked:

"Q. (By Ms. James) Well, if there is evidence of violence in this case or there are descriptions of injuries or wounds leading to death, would that fact alone prejudice you against Randall Dale Adams?
"A. No.
"Q. All right. Would the presence of violence, bloodshed, injury or death shock you or embarrass you so as to interfere with your objectivity?

"A. No, ma'am.
"Q. All right. Would evidence of injuries causing death hamper your consideration of all the other evidence in any way?
"A. I don't think so.
"Q. You're not just going to get grossed out and stampede some way or other?
"A. No, ma'am.
"Q. All right. The Defendant, of course, is entitled to his day in Court; you do agree with that?
"A. Yes, ma'am.
"Q. All right. Would you be upset because this is a case in which someone has died?
"MR. SCOTT: Judge, we object. That—
"THE COURT: Sustained."

The question objected to was duplicitous, and the trial court did not err by sustaining the objection. *Bodde v. State,* supra; *Smith v. State,* supra.

The following exchange took place during appellant's examination of venire member Anita Pritchett:

"Q. All right. Now, if the Court should instruct you that the silence of the person on trial is not evidence and after the Court has charged you on the law and that is a necessity after the prosecution has rendered their version, would you still expect Randall Dale Adams to testify?
"THE COURT: Realizing again, that he has no obligation to testify.
"THE WITNESS: Right. That is his right. If he wants to testify in his behalf, I think that would be—
"Ms. JAMES CONTINUING:
"Q. Would you expect him to explain?
"MR. SCOTT: Judge, I think that is an improper question.
"THE COURT: Sustained."

We again find no abuse of discretion. *Bodde v. State,* supra; *Smith v. State,* supra; *Barry v. State,* supra.

It should be noted, with regard to the questioning of the venire members as to their desire or expectation that appellant testify, that appellant did testify at the guilt-innocence phase of the trial. Thus, the harm, if any, caused appellant by the rulings of the trial court complained of above was rendered moot.

Appellant contends that thirteen venire members were erroneously excluded for cause under V.T.C.A. Penal Code, Sec. 12.31(b), which provides that a prospective jury member in a capital case shall be disqualified unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact. Specifically, appellant contends that by permitting the application of Sec. 12.31(b), supra, to the three punishment issues specified by Art. 37.071, V.A.C.C.P., the trial court bestowed upon the prosecution a broader basis of exclusion than allowed under the rule of *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). However, this Court has consistently held that the statutory scheme for the selection of jurors in capital cases in Texas, and in particular the application of Sec. 12.31(b), supra, to the punishment issues, comports with the constitutional requirements of *Witherspoon. Hughes v. State,* 563 S.W.2d 581 (Tex.Cr.App.1978); *Hughes v. State,* 562 S.W.2d 857 (Tex. Cr.App.1978); *Freeman v. State,* 556 S.W.2d 287 (Tex.Cr. App.1977); *Burns v. State,* 556 S.W.2d 270 (Tex.Cr.App. 1977); *Boulware v. State,* 542 S.W.2d 677 (Tex.Cr.App. 1976); *Moore v. State,* 542 S.W.2d 664 (Tex.Cr.App.1976). The trial court did not err in excluding from the jury those venire members who could not state that their deliberations on the punishment issues would not be affected by the mandatory penalty of death or life imprisonment.

Other than to object to the application of the statute to the punishment issues, appellant does not take issue with the trial court's determination that the thirteen venire members were disqualified under Sec. 12.31(b), supra. We have reviewed the voir dire examinations of these venire members and conclude that the trial court was correct in its determination.

Appellant contends that Art. 37.071, V.A.C.C.P., is unconstitutional because the punishment issues specified therein, in particular the second issue, "fail to present for the jury's consideration any concept of 'desert,' thus depriving the defendant of the critical consideration of the jury of any defined standard by which they may decide if the defendant 'ought to die,' this being a requirement of the Constitution as interpreted in *Gregg v. Georgia,* [428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)]." In a related argument,

appellant contends that Art. 37.071, supra, is unconstitutional because "there are no provisions for jury lenience if all the special issues are answered affirmatively thus calling for jury negation should the jury believe that under all the circumstances the defendant does not 'deserve' a sentence of death."

Appellant acknowledges that the defendant in a capital case in Texas may offer at the punishment hearing any relevant mitigating evidence. *Jurek v. State,* 522 S.W.2d 934 (Tex.Cr.App.1975), affirmed, *Jurek v. Texas,* 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); *Robinson v. State,* 548 S.W.2d 63 (Tex.Cr.App.1977). See also *Lockett v. Ohio,* — U.S. —, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). However, appellant argues that such evidence is of no avail to the defendant if the jury is convinced by the evidence beyond a reasonable doubt that the punishment issues should be answered affirmatively. In such a case, appellant argues, the punishment of death is mandatory even though the jury, on the basis of the mitigating evidence, may believe that death is inappropriate. Appellant contends that this system is of the sort condemned in *Woodson v. North Carolina,* 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), and *Roberts v. Louisiana,* 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976).

In *Gregg,* the Supreme Court recognized retribution as one of the underlying purposes of the death penalty. The Court also made it clear that the sentencing authorities must give attention to the nature and circumstances of the crime and to the character of the defendant in determining whether death is the appropriate punishment in a particular case. From this, appellant asserts that "[i]t may no longer be doubted that there must be a finding that the individual adjudged guilty of a capital crime 'deserves to die' before he can be so sentenced." But the Court clearly did not intend that the sentencing authority be given such broad discretion to decide whether a given defendant ought to receive the death penalty:

> "*Furman* [*v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)] mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion should be suitably directed and

limited so as to minimize the risk of wholly arbitrary and capricious action."

Gregg v. Georgia, supra, 428 U.S. at 189, 96 S.Ct. at 2932.

The Supreme Court has described the Texas capital sentencing scheme as follows:

> ". . . Texas law essentially requires that one of five aggravating circumstances be found before a defendant can be found guilty of capital murder, and that in considering whether to impose a death sentence the jury may be asked to consider whatever evidence of mitigating circumstances the defenses can bring before it . . . [T]he Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death."

Jurek v. Texas, supra, 428 U.S. at 273, 274, 96 S.Ct. at 2957. Appellant would substitute for this guided discretion the right of the jury to decide, by its own lights, whether or not the defendant ought to die. The flaw in appellant's argument is best seen when it is turned around: if a defendant may not be given the death penalty, regardless of the jury's answers to the punishment issues, unless the jury believes that he "deserves to die," it would follow that if the jury so believes, then the defendant must be sentenced to death regardless of the answers to the punishment issues. Thus, appellant would return to the jury in a capital case the unbridled discretion to impose the death penalty condemned in *Furman v. Georgia,* supra.

Lockett v. Ohio, supra, does not support appellant's contentions. In *Lockett,* the Court held that the Ohio capital sentencing scheme was unconstitutional because the sentencing authority was permitted to consider only three specified mitigating circumstances. The Court held that any relevant mitigating evidence offered by the defendant must be considered by the sentencing authority in determining whether the punishment of death should be imposed. Texas practice is in accord with this holding. *Jurek v. State,* supra; *Robinson v. State,* supra. At the same time, the Court re-stated the view of the plurality in *Gregg* that the discretion of the sentencing authority must be "directed and limited" so that the death penalty will be imposed in a consistent manner. *Lockett v. Ohio,* supra, 98 S.Ct. at 2963. The three issues specified in Art. 37.071, supra, provide this direction and limit the discretion of the jury so as to prevent the arbitrary or capricious imposition of the death penalty.

Contrary to appellant's contention, Art. 37.071, supra, is not a mandatory statute of the sort held unconstitutional in *Woodson v. Norh Carolina,* supra, and *Roberts v. Louisiana,* supra. The statutes struck down in *Woodson* and *Roberts* mandated the death penalty for all defendants convicted of first-degree murder, without consideration of mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender. These statutes invited juries to disregard their oaths and the trial judge's instructions and choose either a not guilty verdict or a guilty verdict for a lesser offense whenever they felt that the death penalty was inappropriate. Thus, the North Carolina and Louisiana capital sentencing procedures did not provide standards to channel jury judgments, nor did they permit review to check the arbitrary exercise of the capital jury's de facto sentencing discretion.

Although the death penalty in Texas is mandatory upon the return of affirmative answers to the three punishment issues, Art. 37.071, supra, the jury does not consider the punishment issues unless it has first found the defendant guilty of murder under certain specified aggravating circumstances. V.T.C.A. Penal Code, Sec. 19.03. Furthermore, in answering the punishment issues the jury must consider all the relevant evidence concerning the particular offense and the individual defendant offered by the State or by the accused. *Jurek v. State,* supra; *Robinson v. State,* supra. The punishment issues give guidance to the jury regarding those factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision. *Gregg v. Georgia,* supra, 428 U.S. at 192, 96 S.Ct. 2909. The punishment issues provide for the guided jury discretion found wanting in pre-*Furman* death penalty statutes and in the statutes in question in *Woodson* and *Roberts.*

We hold that Art. 37.071, supra, is not unconstitutional for failure to present for the consideration of the jury the concept of "desert." We also hold that Art. 37.071, supra,

does not impose the death penalty in an unconstitutionally mandatory manner.

Appellant contends that the phrase "criminal acts of violence" contained in the second punishment issue is a technical legal phrase which must be defined in the jury charge. He further contends that left undefined, the phrase is unconstitutionally vague and calls upon the jury to decide a question beyond its competence. These contentions have been presented to and rejected by both this Court and the United States Supreme Court. *Jurek v. Texas,* supra; *Jurek v. State,* supra; *Blansett v. State,* 556 S.W.2d 322 (Tex.Cr. App.1977); *King v. State,* 553 S.W.2d 105 (Tex.Cr.App. 1977); *Battie v. State,* 551 S.W.2d 401 (Tex.Cr.App.1977).

In his final ground of error, appellant contends that the evidence is insufficient to support the jury's affirmative answer to the second punishment issue. The record discloses that appellant's only prior criminal conviction was for driving an automobile while intoxicated. Appellant had also been absent without leave for a short time during his service in the Army. At the punishment hearing, Dr. John Holbrook, a psychiatrist, testified that he had examined appellant and determined that he has the profile and characteristics of a sociopath. Holbrook also testified that he would expect little or no change in this diagnosis in the future and that, in his opinion, appellant would commit criminal acts of violence in the future that would constitute a continuing threat to society. Dr. James Grigson, another psychiatrist, gave similar testimony. This testimony, when considered with the evidence of the crime itself, which was a particularly senseless and motiveless killing, is sufficient to support the jury's determination that appellant would constitute a continuing threat to society. *Ferguson v. State,* 573 S.W.2d 516 (Tex.Cr.App.1978); *Shippy v. State,* 556 S.W.2d 246 (Tex.Cr.App.1977); *Moore v. State,* 542 S.W.2d 664 (Tex.Cr.App.1976).

The judgment is affirmed.

SUPREME COURT OF THE UNITED STATES

No. 79-5175

RANDALL DALE ADAMS, PETITIONER,

v.

TEXAS

ON PETITION FOR WRIT OF CERTIORARI to the Court of Criminal Appeals of Texas.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted, limited to the questions presented by the Court: (1) Is the doctrine of *Witherspoon* v. *Illinois,* 391 U.S. 510, applicable to the bifurcated procedure employed by Texas in capital cases? (2) If so, did the exclusion from jury service in the present case of prospective jurors pursuant to Texas Penal Code § 12.31(b) violate the doctrine of *Witherspoon* v. *Illinois, supra*?

December 10, 1979

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * *

NO. 79-5175

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ORIGINAL COPY

RANDALL DALE ADAMS,
Petitioner

V.

THE STATE OF TEXAS,
Respondent

* * *

On Petition For Writ Of Certiorari
To The Court Of Criminal Appeals Of Texas

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

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OCTOBER TERM, 1979

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NO. 79-5175

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RANDALL DALE ADAMS,
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V.

THE STATE OF TEXAS,
Respondent

* * *

On Petition For Writ Of Certiorari
To The Court Of Criminal Appeals Of Texas

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

NOW COMES the State of Texas, Respondent in the above entitled and numbered cause, and by and through the attorney of record, the Attorney General of Texas, Mark White, files this Brief in Opposition.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals is reported as Adams v. State, 577 S.W.2d 717 (Tex.Crim.App. 1979).

JURISDICTION

Petitioner is seeking to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I. Whether the exclusion of certain prospeqtive jurors violated the holding in Witherspoon v. Illinois, 391 U.S. 510 (1968).

II. Whether the use of psychiatric testimony during the punishment phase of the trial constituted competent evidence within the meaning of the due process clause.

III. Whether the failure to disclose a prior written statement on identification to Petitioner violated his rights under Brady v. Maryland, 373 U.S. 83 (1963).

CONSTITUTIONAL PROVISIONS INVOLVED

1. UNITED STATES CONST., AMEND. VI.
2. UNITED STATES CONST., AMEND. VIII.
3. UNITED STATES CONST., AMEND. XIV.

STATEMENT OF THE CASE

Petitioner was indicted and convicted in Dallas County, Texas, for the capital murder of a peace officer in the lawful discharge of his duties. The offense was alleged to have been committed on November 28, 1976. Petitioner was arrested on December 21, 1976. The indictment was returned on February 21, 1977, by the Dallas County grand jury. Jury selection began on March 28, 1977, and the verdict was returned on May 3, 1977. Petitioner filed a motion for new trial which was overruled by the trial court on May 20, 1977. The conviction and sentence were affirmed by the Texas Court of Criminal Appeals on January 31, 1979. Petitioner's motion for leave to file motion for rehearing was denied on March 21, 1979.

The evidence introduced at trial showed the following sequence of events. In the early morning hours of November 28, 1976, Officers Robert Wood and Teresa Turko were on routine patrol. Both were in police uniform and in a police marked patrol car. Wood, the deceased, was driving the vehicle. Wood and Turko observed a small car driving without headlights. The car was one which had been stolen previously by David Harris. It was being driven by Petitioner. David Harris was slumped down on the passenger's side of the front seat so that he could not be seen from the outside of the car.

After stopping the car, Wood with a flashlight in hand, approached the driver's side of the car. Turko stationed

herself by the right rear fender of the car. When Wood reached the driver's side of the car Turko heard Wood say, "Oh, my gosh" then she heard a volley of gunshots. Officer Wood was killed instantly and fell to the ground. The car driven by Petitioner sped away in a barrage of gun fire from Officer Turko.

Officer Turko could not identify the driver of the vehicle but was able to give a description based on her observation of the back of his head and coat collar. That description was compatable with that of Petitioner. She testified that the driver of the car could not have been David Harris.

Michael Randall drove by the scene when the car had been stopped by the police but the officers had not yet approached the driver. Randall positively identified Petitioner as being behind the wheel of the stopped car.

Emily Miller and her husband R. L. Miller, also drove past the scene. They observed both stopped cars and saw the deceased, whom they knew, get out of the patrol car. After passing by the Millers heard what they thought might have been shots. Both Mr. and Mrs. Miller positively identified Petitioner as being the driver of the stopped car.

The autopsy revealed that Officer Wood sustained five gunshot wounds. One was fired at a range of no more than three inches. Of the bullets which were recovered, balistics showed them to be fired by a pistol to which Petitioner had access.

David Harris testified that Petitioner was driving the car which had been stolen by Harris. When stopped by the police, Petitioner reached under the seat and produced a .22 caliber pistol which also had been stolen by Harris. Harris testified that Petitioner shot Wood five times. Harris' testimony was corroborated by a written statement from Petitioner (S/F 522) which recited substantially the same events as those recited by Harris. The major dissimilarity being a period of time which Petitioner could not remember. That time coincided with the time of the murder. Petitioner presented an alibi defense. He testified that he was in a hotel room with his sleeping mother at the time of the offense. Three witnesses were then called by the State in rebuttal to identify Petitioner as the driver of the car when it was stopped.

At the punishment stage of the trial testimony was introduced from two psychiatrists, both of whom testified that Petitioner suffered from sociopathic personality traits. The only evidence introduced by Petitioner on punishment was testimony from his mother that he was a "good son".

ARGUMENT AND AUTHORITIES

I.

THE EXCLUSION OF CERTAIN PROSPECTIVE JURORS DURING VOIR DIRE DID NOT VIOLATE THE HOLDING IN WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968).

Petitioner claims that the excusal of nine specific veniremen violated his rights as set forth in Witherspoon v. Illinois, 391 U.S. 510 (1968).

The overall thrust of Witherspoon v. Illinois, supra, is that veniremen may not be excluded "simply because they voiced general objections to the death peanlty or expressed conscientious or religious scruples against its infliction." Id. at 522. Witherspoon goes on to declare that the State may properly exclude those who make unmistakably clear that (1) they would vote against the death penalty regardless of the facts or circumstances or (2) they could not be impartial fact-finders as to guilt. Id. at 522.

At the time of this decision the statutory provisions gave the jury no rules or guidelines for determining the ultimate penalty. As a result, the Illinois statute, as

well as those of other states, was declared so arbitrary and capricious as to violate the United States Constitution. Moore v. Illinois, 408 U.S. 786 (1972); Furman v. Georgia, 408 U.S. 238 (1972).

Texas responded to the decision in Furman by providing legislation for capital punishment in five particulary aggravated classes of murders. Further, the Legislature decreed that a death sentence could by applied only after unanimous affirmative jury findings on three special issues which provided for consideration of the facts of the offense and the character of the indivicual offender. To insure that the jury would be an impartial fact-finding body, the Legislature additionally provided that "A prospective juror shall be disqualified from serving unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issues of fact." Sec. 12.31(b), Texas Penal Code.

The provisions of this statute not only incorporate the thrust of footnote 21 in the Witherspoon opinion, but go further in protecting the rights of the accused from being tried by a jury who would be influenced by bias or prejudice. A juror sworn under the provisions of §12.31(b) is one who has sworn to consider only the facts and evidence and not be influenced by any bias as to punishment.

A juror biased in favor of the death penalty is prohibited from service equally as one who is biased against the death penalty. The use of the statute as a means of disqualification, by either the defense or the State, is not unconstitutional. A venireman who believes literally in a biblical instruction of "a life for a life" would be disqualified as would a venireman who could not fairly consider the death penalty or be impartial in determining the facts presented in evidence. The Texas Court of Criminal Appeals

has recognized this and has reversed two death penalty convictions because the defendant was improperly denied a challenge for cause to a venireman who could not consider life imprisonment. See Smith v. State, 573 S.W.2d 763 (Tex.Crim App. 1978); Cuevas v. State, 575 S.W.2d 543 (Tex.Crim.App. 1978).

Venireman Francis Mahon (S/F 31-71) stated that she would be affected in her deliberations on fact issues by the ultimate penalty of death or life imprisonment. She further testified that if she had any doubt she would answer the questions in the negative. Mrs. Mahon was properly excluded not only under the provisions of Texas Penal Code §12.31(b), but also in that she would hold the State to a higher burden of proof by automatically voting no if there was any doubt.

Venireman Forrest J. Jenson (S/F 348-371) was excluded under the provisions of Art. 12.31(b). He also stated that a man would have to be proven guilty "beyond all reasonable doubt" before he could vote yes to these special issues. Further, counsel for Petitioner although making an objection to the exclusion of venireman Jenson, did not present the same grounds for that objection as are now urged. Absent a correct contemporaneous objection, the error as to Witherspoon error is waived. Boulware v. State, 542 S.W.2d 677 (Tex. Crim.App. 1976) cert. denied 430 U.S. 959 (1977).

Venireman Nelda Coyle (S/F 1017-1071) stated she did not want to be a juror on this case. She also stated that she did not know if she could be an impartial juror. Venireman Coyle was finally excluded under the provisions of Art. 12.31(b) when she could not state under oath that she would not be affected in her deliberations on any issue of fact.

Venireman White (S/F 1525-1566) stated initially upon questioning that she probably wouldn't vote for the death

penalty. (S/F 1543). After defense counsel was given an opportunity to rehabilitate the witness she became quite confused. Venireman White stated "It's not getting to me, this is all just going all over me." (R. 1555). Although at one point she stated that she felt she could put aside her feelings she then stated "I think I answered wrong. I think I have to go back the other way now." (S/F 1559). She ended the voir dire examination by stating that she would definitely be affected in her deliberations on fact issues by her knowledge of the range of punishment.

Venireman Curtis Williams (S/F 2571-2604) stated that "If I knew all three questions was going to kill a guy, I don't think I could answer them yes." (S/F 2595). He further stated that "I think I would be influenced by the death penalty." (S/F 2598). After further questioning by counsel for both parties he again stated that he would be affected in his deliberations by the punishment of death or life imprisonment. (S/F 2603).

Venireman Bobbie Andrews (S/F 2692-2730) stated that "My personal feeling is that I don't want to be a part of taking someone's life." (S/F 2727). The court immediately then asked her whether or not she could swear under oath that the mandatory punishment of death or life imprisonment would not affect her deliberations on any fact issue in the case. Venireman Andrews answered "I cannot do that." On the basis of those answers she was excused from the jury panel.

Venireman Anthony Giuffrida (S/F 4443-4464) stated that at the present time he did not feel he could ever vote for death. (S/F 4456). He went on to say that he would be affected in his deliberations by the fact that the death penalty was a possible punishment. His final answer to questioning was that "I don't think I could actually give it." (S/F 4461).

Venireman Penny McDonald (S/F 4492-4571) initially stated that she was opposed to capital punishment. She further stated that murder of a police officer is not one of the crimes that she could ever vote for the death penalty on. (S/F 4497). She also stated that if she felt there was mental illness involved, even if sanity was not an issue, that she could not give the death penalty. She finally stated that she could not take an oath that she would lay aside her preconceived feelings about the mandatory sentence. (S/F 4568).

Venireman Dorothy Riddle (S/F 4920-4947) stated that she did not believe she could put her feelings aside and answer fact questions without considering the punishment.

All of these veniremen by their answers to the questions showed that they could not be fair and impartial jurors who could objectively listen to the evidence and return a verdict.

The veniremen excluded in this case were properly excluded as were the veniremen who were excluded in Lockett v. Ohio, ___ U.S. ___, 98 S.Ct. 2954 (1978). The veniremen in Lockett could not take an oath to "well and truly try this case . . . and follow the law". The convictions of the veniremen in that case were such that they could not take that oath knowing that a possibility existed in regard the capital punishment. If a venireman cannot be trusted to "abide by existing law" and "follow conscientiously the instructions" of the trial judge they are properly excusable from the venire. Boulden v. Holman, 394 U.S. 478 (1969).

It should also be noted that the State only used eleven (11) of its fifteen (15) statutory peremptory challenges.

Since all of the veniremen complained of in the case at bar were either unalterably opposed to capital punishment or could not take an oath to set aside their bias and preju-

dice and follow the law they were properly excluded and certiorari should therefore be denied.

II.

PETITIONER WAS NOT DENIED DUE PROCESS BY THE USE OF PSYCHIATRIC TESTIMONY DURING THE PUNISHMENT PHASE OF THE TRIAL.

Petitioner contends that under the Texas statutory punishment scheme psychiatric testimony does not constitute competent evidence upon which to predicate the imposition of the death penalty. He bases this argument on the due process clause to the Constitution and also on Addington v. Texas, ___ U.S. ___, 99 S.Ct. 1804 (1979).

The State was charged with proving beyond a reasonable doubt that the murder committed by the Petitioner was committed deliberately with the intent that a death would result and further that the Petitioner would continue to commit crimes of violence in the future.[1/] The jury had before it all of the evidence of the crime as well as the evidence presented from the two psychiatric witnesses. The evidence showed that Petitioner deliberately and with no justification fired five shots into Officer Wood. This type of crime is the type of crime that is generally considered such an outrage to society as to be deserving the death penalty. See Gregg v. Georgia, 428 U.S. 153 (1976). The psychiatric testimony which was presented showed that Petitioner exhibited sociopathic personality traits. These personality traits showed that Petitioner possessed the type of personality that was without conscience. The only evidence in mitigation presented by the Petitioner was testimony from his mother that Petitioner had been a "good son."

The evidence presented at both the trial in chief and at the punishment stage of the trial was more than sufficient

1/ Art. 37.071, Texas Code of Criminal Procedure.

to support the jury findings. Petitioner's reliance on Addington v. Texas, supra, is misplaced. Addington dealt with the standard of proof required in a civil commitment case. In the case at bar, the standard was that of beyond a reasonable doubt. Since the heavy standard of criminal cases was applied in the case at bar the risk of error to the individual was greatly minimized. It is unnecessary to evaluate the evidence to determine whether or not it was "competent". The standard to apply is wheher or not the evidence was sufficient to support the jury findings. That question has not been presented to this Court. Therefore, since the evidence was both competent and sufficient and the issue presented by Petitioner is not one in which certiorari is proper, Respondent respectfully asserts that certiorari should be denied.

III.

THE PROSECUTOR'S FAILURE TO DISCLOSE A PRIOR WRITTEN STATEMENT OF A STATE'S WITNESS DID NOT VIOLATE PETITIONER'S RIGHTS UNDER BRADY V. MARYLAND, 373 U.S. 83 (1963).

Petitioner alleged that the prosecutor failed to reveal prior to trial, a written statement executed by one of the prosecution's witnesses.

Soon after the shooting of police Officer Wood, three witnesses gave written statements to police. One of these witnesses, Emily Miller, described the assailant as having about a three inch afro and of being either a Mexican or a very light-skinned black man. (Defendant's Ex. 17). Petitioner contends that since he is neither black nor of Mexican descent, this prior statement was relevant to the issue of Emily Miller's credibility and that the prosecutor improperly withheld the statement in violation of the rule of Brady v. Maryland, 373 U.S. 83 (1963).

Petitioner further argues that the Court of Criminal Appeals legally side-stepped the issue of the prosecutor's

alleged misconduct in failing to produce the statement, by applying state law and procedure to exculpate his omission. What Petitioner chooses to ignore is the Court of Criminal Appeals' evaluation of the written statement in light of the entire record, a procedure proscribed by this Court in the case of United States v. Agurs, 427 U.S. 97 (1976).

The record reveals, that prior to trial, Petitioner's counsel filed a motion for the disclosure of evidence favorable to the accused. In that motion he asked for, among other things, the statements of witnesses. At a pretrial hearing the trial court asked the prosecution if the state had access to anything which would go to show the innocence of the defendant or that would be inconsistent with the theory of the defendant's guilt. The prosecutor stated he did not. (S/F 25). Three days after Emily Miller testified and after defense counsel had waived her further appearance, the defense counsel asked the prosecutor to see the written statements of the three identification witnesses. At this point in the trial, both sides had rested and Emily Miller was no longer available to testify. The trial court denied counsel's request to introduce her prior written statement into evidence.

Under Texas law a defendant is entitled to examine the written statement of a witness for purposes of cross-examination, upon demand made after the witness has testified on direct examination. Gaskin v. State, 353 S.W.2d 467 (Tex.Crim.App. 1961). In addition, Art. 39.14, V.A.C.C.P. specifically excepts written statements of witnesses from pre-trial discovery. A defendant is, therefore, entitled to examine the prior statements of a state's witness only if he makes a timely and specific request to do so following the witness' direct testimony.

Petitioner's attorney did not request to see Emily Miller's written statement until three days after she had testified. Petitioner attempts to excuse his untimely request by laying the blame to the proseuctor's earlier pretrial statements that he did not have exculpatory material in his file. Respondent submits that Petitioner's counsel was aware of his duty to ask whether any prior statements had been made his oversight in failing to do so cannot now be shifted to the prosecution.

Even if the prosecutor's omission in producing Emily Miller's statement during the pretrial proceedings was in any way error, such error would be harmless beyond a reasonable doubt since Emily Miller's testimony during the case-in-chief was substantially the same as her written statement.

During a hearing, outside the presence of the jury, Emily Miller testified that Petitioner could be either a Mexican or a very light-skinned black man. (Tr. 1086). Upon re-direct, the defense counsel never questioned Emily Miller regarding her statements concerning Petitioner's race; at no time did he challenge or object to her identification of the Petitioner. Instead, defense counsel waived further appearance of Emily Miller. (Tr. 1092). Apparently Petitioner's counsel attached no great significance to Emily Miller's observations of the possibilities of Petitioner's race. The overwhelming evidence of Petitioner's guilt and Emily Miller's positive and unequivocal identification of Petitioner, accounts for the absence of an objection. E.g. Wainwright v. Sykes, 443 U.S. 72 (1977).

Further, it should be stressed that Emily Miller was only one of three identification witnesses. Her statement describing the suspect as a black or Mexican man was based on having seen the assailant for a few seconds as she and

her husband drove past the scene. The record does reveal, however, that she positively identified Petitioner in both a lineup and a photographic display as did the other two witnesses.

Petitioner relies on this Court's holding in Brady v. Maryland, supra, to support his contention that the prosecutor's omission of the written statement during pretrial proceedings deprived Petitioner of due process. This Court held in United States v. Agurs, supra, that unless a prosecutor's omission deprived a defendant of a fair trial, there is no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there is no breach of a prosecutor's constitutional duty to disclose. United States v. Agurs, supra, at 108. Furthermore, constitutional obligation is not measured by the moral culpability, or the willfulness, of a prosecutor. Brady v. Maryland, supra; Mooney v. Holohan, 294 U.S. 103 (1934).

Implicit in Brady and in Agurs, is that the fact that not only must there be a specific request for a statement but that the statement must be "material." (Emphasis added). Brady v. Maryland, supra at 87; United States v. Agurs, supra. The question of whether a statement is "material" rests on the determination of whether the suppressed evidence might have affected the outcome of the trial. Brady v. Maryland, supra. This Court has held that the prosecutorial omission such as in Petitioner's case, must be evaluated in the context of the entire record -- the very procedure followed in this case by the Texas Court of Criminal Appeals. United States v. Agurs, supra, at 112. If there is no reasonable doubt about guilt, as the Court of Criminal Appeals concluded in Petitioner's case, whether or not the additional evidence is considered, there is no justification for a new trial. Respondent submits that in view of the evidence and testimony at Petitioner's trial, including Emily Miller's

unchallenged testimony at the sub rosa hearing, and in view of this Court's observations in Brady and Agurs, the prosecutor's nondisclosure of Emily Miller's prior written statement can only be characterized as harmless under the customary harmless-error standard. The Court of Criminal Appeals has faithfully followed the dictates of this Court in Petitioner's case regarding the prosecutor's omission in furnishing a witness's pretrial statement.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully prays that the Petition for Writ of Certiorari be in all things denied.

Respectfully submitted,

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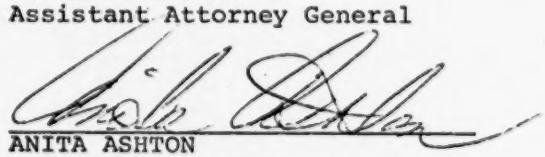

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5175

RANDALL DALE ADAMS,

Petitioner,

v.

THE STATE OF TEXAS.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5175

RANDALL DALE ADAMS,

Petitioner,

v.

THE STATE OF TEXAS.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Court of Criminal Appeals is reported at 577 S.W.2d 717 (Petition for Writ of Certiorari, Appendix A, pp. 16 *et seq.*)

JURISDICTION

The judgment of the Court of Criminal Appeals was entered on January 31, 1979. (Pet.App.A 16) A motion for rehearing was denied on March 21, 1979. (Pet.App.A 16) On June 12, 1979, Mr. Justice Powell extended the time

within which to file a petition for a writ of certiorari to and including August 7, 1979. The petition was filed on August 7, 1979, and was granted on December 10, 1979. The jurisdiction of this Court rests upon 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

(1) Is the doctrine of *Witherspoon v. Illinois,* 391 U.S. 510, applicable to the bifurcated procedure employed by Texas in capital cases?

(2) If so, did the exclusion from jury service in the present case of prospective jurors pursuant to Texas Penal Code §12.31(b) violate the doctrine of *Witherspoon v. Illinois,* supra?

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> . . . nor shall any State deprive any person of life . . . without due process of law . . .

STATEMENT OF FACTS

1. During the voir dire examination of the prospective jurors in this case the prosecutors inquired *seriatim* of each

venire person his or her general attitude regarding the death penalty, his or her qualification to serve on the jury under *Witherspoon v. Illinois,* and his or her qualification to serve on the jury under Section 12.31(b).

The pattern of interrogation used by the prosecutors was to first advise the venire member that the State was seeking the death penalty in this case and then ask the prospective juror to express his or her general 'feelings' about the death penalty. Following such expression, the venire member was interrogated to determine his or her qualification to serve on the jury under *Witherspoon.* The prosecutors then outlined, in general terms, the Texas death penalty procedure, i.e., that there would be a bifurcated trial and that at the punishment phase of the trial the jury would be called upon to answer the three questions prescribed by law.[1] The

---

[1]TEX.CODE CRIM.PRO.ANN. art. 37.071 (Vernon Supp. 1979), provides:

> (a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.
>
> (b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:
>
> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(continued)

prospective juror was next told that 'yes' answers to all three questions resulted in a mandatory sentence of death, and that a 'no' answer to any one of the questions resulted in the imposition of a life sentence. Finally, the prosecutors read to each venire member the three questions. With all of the foregoing as a predicate, each prospective juror was advised of and interrogated about the oath required by Section 12.31(b).[2] Those venire members who could not state under

(footnote continued from preceding page)

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

[2]TEX.CODE CRIM.PRO.ANN. art. 12.31(b) (Vernon 1974) provides:

(b) Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

oath that they would not be affected in their deliberations on any issue of fact by the mandatory penalty of death or life imprisonment were challenged by the prosecution for cause pursuant to Section 12.31(b). In several instances, despite the qualification of a prospective juror under *Witherspoon* standards, and despite the venire member's commitment to answer the three punishment questions honestly, based solely on the facts presented and on the law given by the court, prospective jurors were excused by the trial court at the State's insistence, over the timely and specific objections of the petitioner, pursuant to Section 12.31(b).

2. On appeal the petitioner argued that venire members had been erroneously excluded for cause in violation of *Witherspoon* when the trial court sustained the prosecutors' challenges for cause made under Section 12.31(b) to prospective jurors who were qualified under *Witherspoon.*[3] The Court of Criminal Appeals described the petitioner's claim of error in the following terms. "Specifically, [petitioner] contends that by permitting the application of Sec. 12.31(b), supra, to the three punishment issues specified by Art. 37.071, V.A.C.C.P., the trial court bestowed upon the prosecution a broader basis of exclusion than allowed under the rule of *Witherspoon v. Illinois,* [*supra*]." *Adams v. State,* 577 S.W.2d at 728.

The Court of Criminal Appeals responded to the petitioner's argument thusly:

> . . . this Court has consistently held that the statutory scheme for the selection of jurors in capital cases in Texas and in particular the application of Sec. 12.31(b), *supra,* to the punishment issues, comports with the constitutional requirements of *Witherspoon.* [Citations omitted.] The trial court did not err in

[3]Appellant's Brief 43-54, *Adams v. State, supra.*

> excluding from the jury those venire members who could not state that their deliberations on the punishment issues would not be affected by the mandatory penalty of death or life imprisonment.

Id.

SUMMARY OF ARGUMENT

I.

A.

The Texas death penalty scheme, as enacted and as construed by the Texas Court of Criminal Appeals, contains considerable jury discretion in the sentencing aspects of capital cases. In order to protect a capital felony defendant's Sixth Amendment right to a jury drawn from a fair, representative cross section of the community, and more particularly to ensure that a jury's punishment decision in a capital case will properly reflect the conscience of the community, it is imperative that persons not be systematically excluded from jury service on any broader basis than allowed by *Witherspoon*. Nothing about the Texas capital punishment procedure, as written, as construed, or as used, eliminates the need for *Witherspoon*-qualified jurors in Texas death penalty cases, or justifies the wholesale exclusion of prospective jurors under the narrow ground for exclusion provided by Section 12.31(b).

B.

This Court has already applied *Witherspoon* to the

Georgia post-*Furman*[3a] capital punishment procedure in *Davis v. Georgia*, 429 U.S. 122 (1976). Since the Texas post-*Furman* death penalty procedure is materially identical to Georgia's *stare decisis* compels application of Witherspoon to the Texas capital punishment scheme.

II.

Based on the voir dire examination of the prospective jurors in this case, it is clear that Section 12.31(b) was used by the prosecution to disqualify at least seven prospective jurors who were qualified under *Witherspoon* standards. While all of these disqualified venire members were unable to swear that they would not be affected in their deliberations of the petitioner's case by the mandatory penalties provided by law (as required by Section 12.31(b)), these prospective jurors all stated that they would not automatically vote against the death penalty regardless of the evidence presented in the petitioner's case.

ARGUMENT

I.

A.

The Texas death penalty scheme survived constitutional attack in *Jurek v. Texas*, 428 U.S. 262 (1976), because it replaced standardless discretionary jury sentencing in capital cases, which was condemned in *Furman v. Georgia*,

[3a] *Furman v. Georgia*, 408 U.S. 238 (1972).

supra, with guided jury discretion.[4] The Texas scheme fulfills the requirement that "[a] jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed", *Jurek v. Texas, supra*, 428 U.S. at 271, because "the Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death." *Id.* at 274. Of critical importance to the *Jurek* decision, and to the proper decision of this case, is the conclusion that the Texas procedure "ensur[es] that the sentencing jury will have adequate guidance to enable it to perform its sentencing function." *Id.* at 276.

The sentencing function of the jury in all Texas capital cases[5] is to answer these three statutorily prescribed questions on the basis of the facts presented during both the guilt/innocence phase of the trial and the punishment (sentencing) phase of the trial. The jury's answers to these three questions determine whether the accused receives the death penalty or a sentence of life imprisonment. TEX.CODE CRIM.PRO. ANN. art. 37.071 (b) & (e) (Vernon Supp. 1979). Pursuant

[4]Post-*Furman* capital punishment statutes that have eliminated discretionary sentencing by employing mandatory death sentences in specified types of cases have been declared unconstitutional. *Lockett v. Ohio*, 438 U.S. 586 (1978); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976). Discretion of some sort in connection with the imposition of the death penalty is thus a constitutional prerequisite to the use of that punishment. *Lockett v. Ohio, supra*, 438 U.S. at 601; *Roberts (Stanislaus) v. Louisiana, supra*, 428 U.S. at 334; *Woodson v. North Carolina, supra*, 428 U.S. at 302-304; *Proffitt v. Florida*, 428 U.S. 242 at 258 (1976); and *Gregg v. Georgia*, 428 U.S. 153 at 189 (1976).

[5]One accused of capital murder in Texas cannot waive a jury trial. TEX. CODE CRIM.PRO. ANN. arts. 1.13 & 1.14 (Vernon 1977); *Ex parte Dowden*, 580 S.W.2d 364 (Tex.Crim.App. 1979).

to Section 12.31(b) all prospective jurors in capital cases are told that the answers to the three punishment questions will result in a mandatory sentence of death or life imprisonment. In discharging its sentencing function "the jury will know that their answers will determine whether the defendant is to be punished by death or by life imprisonment." *Hovila v. State*, 532 S.W.2d 293 at 294 (Tex.Crim.App. 1976). While the jury is not called upon to "bring forth the ultimate verdict", *id.*, the jury knows that the defendant's fate — life or death — is mandated by its answers to the three punishment questions.

Under this procedure a jury in a Texas capital case has significant discretionary input into the ultimate sentence imposed upon an accused, not only because under the Texas procedure the jury is aware of the effect of its answers to the three punishment questions, but also because the Texas Court of Criminal Appeals has given the trial courts wide discretion in admitting or excluding evidence at the punishment hearing[6] and has upheld the imposition of the death

[6]*See, e.g., Gholson v. State*, 542 S.W.2d 395 (Tex.Crim.App. 1976), *cert. denied*, 432 U.S. 911 (1977), *reh. denied*, 432 U.S. 882 (1977) (no error in admitting at the punishment hearing the black defendant's notebook containing references to "black power" and "killing whiteys"); *Hovila v. State*, 562 S.W.2d 243 (Tex.Crim.App. 1978), *cert. denied*, 99 S.Ct. 1058 (1979) (no error in excluding at the punishment hearing evidence offered by the defendant that he was mistakenly released from jail following his arrest for capital murder and that while free for four days he remained at his mother's house and committed no crimes); *Hammett v. State*, 578 S.W.2d 699 (Tex.Crim.App. 1979) (no error in admitting unadjudicated offenses attributed to the defendant at the punishment stage of the trial); *Wilder v. State*, 583 S.W.2d 349 (Tex.Crim.App. 1979) (no error in admitting unadjudicated offenses attributed to the defendant at the punishment stage of the trial); *Green v. State*, No. 61914, Tex.Crim.App., October 3, 1979 (no error to admit details of crimes other than the offense charged in the indictment of

(continued)

penalty upon a variety of diverse factual circumstances[7]

(footnote continued from preceding page)

which the defendant had been convicted); *McManus v. State*, No. 58886, Tex.Crim.App., December 5, 1979 (no error in admitting at punishment phase of the trial the testimony of the defendant's former girlfriend that the defendant had attempted to extort her and that the defendant had intended to kill her husband).

This discretion is consistent with this Court's recognition of the need "to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show", *Jurek v. Texas, supra*, 428 U.S. at 272, in connection with the Texas death penalty procedure.

[7]The imposition of the death penalty has been upheld by the Court of Criminal Appeals upon evidence ranging from only the facts established to show the defendant's guilt of the offense charged in the indictment to proof that the defendant had a long history of criminal activity and criminal violence. Contained in this range are numerous cases where the only evidence adduced other than the guilt-facts was the testimony of a psychiatrist predicting the probability of future conduct of the accused, or evidence of unadjudicated offenses, or testimony that the defendant failed to demonstrate any remorse for his capital crime. Additionally, the court has upheld several death sentences imposed upon individuals who, though criminally responsible under Texas law, did not directly participate in the actual murder for which they received the death penalty. Representative of these holdings are the following cases: *Smith v. State*, 540 S.W.2d 693 (Tex.Crim.App. 1976), *cert. denied*, 430 U.S. 922 (1977), *rev'd. sub nom. Smith v. Estelle*, 445 F.Supp. 647 (N.D. Tex. 1978), aff'd, 602 F.2d 694 (5th Cir. 1979) (the defendant had a prior marijuana conviction and was not the triggerman in the capital murder); *Livingston v. State*, 542 S.W.2d 655 (Tex.Crim.App. 1976), *cert. denied*, 431 U.S. 933 (1977) (the defendant was not the triggerman in the capital murder); *Moore v. State*, 542 S.W.2d 664 (Tex.Crim.App. 1976), *cert. denied*, 431 U.S. 949 (1977) (psychiatric testimony that the defendant was a sociopath plus the guilt-facts justified the death sentence); *Shippy v. State*, 556 S.W.2d 246 (Tex.Crim.App. 1977), *cert. denied*, 434 U.S. 935 (1977) (police officer's testimony that the defendant had a bad reputation plus the guilt-facts were held sufficient to justify the death sentence despite psychiatric testimony at the punishment hearing that the defendant's future behavior could not be predicted); *Burns v. State*, 556 S.W.2d 270 (Tex.Crim.App. 1977), *cert.*

(continued)

including one case where the only evidence available to the jury upon which it could base its answers to the three punishment questions consisted of the facts of the capital murder charged in the indictment.[8] That Texas capital case juries are vested with virtually absolute, albeit guided discretion[9] is consistent with Texas' history of providing for jury sentencing in criminal cases,[10] reflecting the generally

(footnote continued from preceding page)

denied, 434 U.S. 935 (1977), *rev'd. sub nom. Burns v. Estelle*, 592 F.2d 1297 (5th Cir. 1979), reh. granted, 598 F.2d 1016 (5th Cir. 1979) (one prior conviction plus one unadjudicated offense held sufficient to justify death penalty); and *Felder v. State*, 564 S.W.2d 776 (Tex.Crim.App. 1977), *cert. denied*, 99 S.Ct. 1433 (1979) (the defendant had three prior felony convictions for non-violent offenses); *Adams v. State*, 577 S.W.2d 717 (Tex.Crim.App. 1979), *cert. granted, supra*, December 10, 1979 (psychiatric testimony indicating that the defendant was a sociopath, the defendant's having been AWOL while in the military service, and the guilt-facts were held sufficient to justify the death sentence despite the young age and lack of prior criminal record of the defendant); *Armour v. State*, 583 S.W.2d 349 (Tex.Crim.App. 1979) the defendant was the "wheel man" in the capital murder, not the "trigger man", and admitted to having participated in another capital murder two days prior to the one charged in the indictment).

[8]*Earvin v. State*, 582 S.W.2d 794, 798-799 (Tex.Crim.App. 1979).

[9]Under Article 37.071(e), Texas trial courts must invariably accept the jury's answers to the three punishment questions and impose either a life or death sentence depending upon the answers to the questions. Trial courts are not free to disregard the jury's answers to the punishment questions.

[10]Prior to 1966 the jury assessed the sentence in all criminal cases in Texas, except in those cases where the punishment was fixed by law, unless the accused waived a trial by jury. TEX.CODECRIM.PRO. art. 693 (1925); 3 Vernon's Ann.Code Crim.Pro. 629, "Special Commentary" (1966). Since an accused has never been able to waive a trial by jury in a capital case in Texas, n. 5, *supra*, it has been the consistent historical requirement in Texas that only a jury impose the sentence in a capital case.

recognized awareness of the important societal function performed by juries. "The jury is a significant and reliable objective index of contemporary values because it is so directly involved." *Gregg v. Georgia, supra,* 428 U.S. at 181. Juries are the representatives and conscience of the community and are called upon to reflect the community's sense of justice in a given case. *Ballew v. Georgia,* 435 U.S. 223, 238 (1978); *Taylor v. Louisiana,* 419 U.S. 522, 527-530 (1975); *Duncan v. Louisiana,* 391 U.S. 145, 151-152, 156-157 (1968). The sentencing discretion reposed in Texas juries in capital cases is symptomatic of what this Court said in *Witherspoon:*

> [O]ne of the most important functions any jury can perform in making [the selection of the death penalty or rejecting it] is to maintain a link between contemporary community values and the penal system — a link without which the determination of punishment could hardly reflect "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (opinion of The Chief Justice, joined by Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Whittaker).

391 U.S. at 520 n. 15. Guided by the standards prescribed by the statute, as construed and applied by the Texas Court of Criminal Appeals,[11] a Texas capital case jury that must answer the three punishment questions and thereby knowingly choose between a sentence of life or death "can do little more — and must do nothing less — than express the conscience of the community on the ultimate question of life or death." *Witherspoon v. Illinois, supra,* 391 U.S. at 519-520.

In order to ensure that a jury will be able to fulfill its role as the conscience of the community, this "Court has un-

[11] *See* p. 8, *supra.*

ambiguously declared that the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community." *Taylor v. Louisiana, supra,* 419 U.S. at 527.[12] The exclusion from the venire of "identifiable segments playing major roles in the community", id. at 530, or of a "discernible class", *Peters v. Kiff,* 407 U.S. 493, 500 (1972), violates the fair-cross-section requirement of the Sixth Amendment because it "destroys the possibility that the jury will reflect a representative cross section of the community", *id.,* in that it results in a jury pool "not 'reasonably representative' of the community [and thereby] denies a criminal defendant his right, under the Sixth and Fourteenth Amendments, to a petit jury selected from a fair cross section of the community." *Duren v. Missouri,* 439 U.S. 357, 99 S.Ct. 664 at 666 (1979) (footnote omitted).

Witherspoon addresses the jury function in sentencing in death penalty cases, and, in recognition of the Sixth Amendment right to a jury that is a representative cross

[12] The reasons why juries should be selected from panels reflecting the broadest community base are fully expressed in *Taylor* as follows:

> The purpose of a jury is to guard against the exercise of arbitrary power — to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of ajudge. *Duncan v. Louisiana,* 391 U.S., at 155-156. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system.

419 U.S. at 530.

section of the community,[13] holds that the exclusion for cause of prospective jurors "simply because they have voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction", 391 U.S. at 522, denies an accused due process of law. Since jurors in a capital case are selected to "express the conscience of the community on the ultimate question of life or death", id. at 519-520, it is essential that a capital jury be drawn from persons representing the divergent community views about the death penalty.[14] A jury " "[c]ulled of all who harbor doubts about the wisdom of capital punishment", *id.* at 520, "produce[s] a jury uncommonly willing to condemn a man to die." *Id.* at 521. If the determination of whether a man is to live or die is to be the true expression of the conscience of the community, the State cannot systematically exclude from a capital case jury all representatives of that part of the community whose oppose capital punishment but who "could nonetheless subordinate [their] personal views to what [they] perceive to be [their] duty to abide by [their] oath[s] as . . . juror[s] and to obey the law of the State." *Id.* at 514 n. 7.

[13]The Court did not explicitly rely on Sixth Amendment cases in *Witherspoon* because *Duncan v. Louisiana, supra,* decided two weeks before Witherspoon, was held non-retroactive in *DeStefano v. Wood,* 392 U.S. 631 (1968), decided two weeks after *Witherspoon.* However, a Sixth Amendment rationale is woven tightly into the fabric of *Witherspoon.*

[14]It is, of course, proper for the State to be able to exclude from a capital jury any person who is irrevocably commited prior to trial to vote against the imposition of the death penalty regardless of the facts of the case, not because such person does not represent an 'identifiable segment' or 'discernible class' within the community, but because such person cannot abide by his oath as a juror to follow the law of the State and return a verdict of death in a proper case. *Witherspoon v. Illinois, supra,* 391 U.S. at 514 n. 7, 522 n. 21.

The post-*Furman* Texas capital punishment procedure uses the jury to securely maintain the "link between contemporary values and the penal system." *Id.* at 520 n. 15. Section 12.31(b) requires that prospective - jurors "be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony." During voir dire examination each prospective juror is explicitly told of the effect of the jury's answers to the three punishment questions.[15] A Texas jury knows that 'yes' answers to the three questions results in the imposition of a death sentence, whereas one 'no' answer requires a sentence of life imprisonment. The Texas capital punishment procedure, as construed by the Texas Court of Criminal Appeals, thrusts upon the jury the responsibility and duty of making the ultimate decision of life or death, despite the camouflage of the three punishment questions. Since the trial courts of Texas are bound by the jury's answers to the questions, under Article 37.071(e) the jury is the only and the final expression of the conscience of the community on the question whether the accused lives or dies.[16] It seems

[15]The Texas Court of Criminal Appeals assumed in *Hovila v. State, supra,* 532 S.W.2d at 294, and in *Hammett v. State, supra,* 578 S.W.2d at 704, that prospective jurors in capital cases would know the effect of their answers to the three punishment questions. Accordingly, the court held that it is not error for the prosecutor to explicitly advise venire members of what sentence is required in response to the jury's answers to the questions.

The voir dire examination in this case manifests these holdings. Each prospective juror was explicitly told that 'yes' answers to all three questions required a mandatory death sentence and that a 'no' answer to any one of the questions required the imposition of a life sentence.

[16]Texas does not provide for a review by either the trial courts or the appellate courts of the propriety of the death penalty in each case, nor does it provide for the comparative appellate review found in the death penalty procedures of other states. See *Proffitt v. Florida, supra,* 428 U.S. at 252-253; and *Gregg v. Georgia, supra,* 428 U.S. at 167.

axiomatic that because a Texas capital jury knows precisely what result — life or death — its answers to the three punishment question will bring, the selection of such a jury should be governed by the same constitutional rule that controls the selection of a jury "empowered . . . to answer 'yes' or 'no' to the question whether [a] defendant [is] fit to live." *Witherspoon v. Illinois, supra,* 391 U.S. at 522 n. 20. The fact that Texas utilizes three punishment questions, the answers to which require a life or death sentence, rather than putting the life or death question to the jury directly, as in the Illinois procedure involved in the *Witherspoon* decision, is a difference without a distinction. By providing that jurors be told during voir dire examination of the effect of their answers to the punishment questions and by making those answers binding as to the punishment to be assessed, the Texas procedure has retained the jury's discretionary input into the sentencing part of a capital case. *Witherspoon* is therefore essential to secure an accused's right to a jury representing a fair cross section of the community.

The punishment questions prescribed by article 37.071 focus a jury's attention on issues deemed relevant by the Texas legislature to the ultimate decision of life or death. But the answers to those questions, no less than a simple 'yes' or 'no' to the ultimate question, constitute nothing more than the expression of the conscience of the community on contemporary values and the penal system. The questions do not insulate jury discretion or the jury's function as the conscience of the community from the decision of whether the accused lives or dies. They call upon the jury to discharge its function as the community's conscience only in a more guided manner than existed under the pre-*Furman* scheme. This is amply reflected in the opinions of the Texas Court of Criminal Appeals upholding the imposition of the death

penalty in widely diverse factual circumstances, demonstrating that court's willingness to be bound by a jury's findings on the punishment questions as being reflections of the community conscience.[17] Thus, to the extent that the jury is endowed with considerable discretion in answering the three punishment questions, *Witherspoon* is required to ensure that an accused facing the death penalty has at least the opportunity to have on his jury persons who, while they may have doubts about capital punishment, will conscientiously deliberate the punishment questions under the facts of the case and the law of Texas.

The factors enumerated above — that the jury answers the punishment questions knowing the effect of their answers; that the questions are designed, and have been construed by the Court of Criminal Appeals to allow the jury substantial discretionary input in arriving at the fateful answers to the punishment questions; that neither the trial court nor the Texas Court of Criminal Appeals may override the jury's answers to the punishment questions; and that the trial court is accorded wide discretion in admitting and excluding evidence at the punishment phase of the trial — coalesce to establish that jury discretion inherent in sentencing in Texas capital cases requires the same potential for a representative, cross section of the community jury that compelled the holding in *Witherspoon.* The conscience of the community has not been exorcised from sentencing in Texas capital cases; it has only been channeled into three specific areas in response to *Furman.* To allow the State to strike from the pool of prospective jurors persons who are qualified under *Witherspoon,* but who are not qualified under Section 12.31(b), permits exclusion of prospective jurors on a "broader basis", *Witherspoon v. Illinois, supra,* 391 U.S.

[17] See nn. 6 & 7, *supra.*

at 522 n. 21, than is necessary to accomplish the legitimate purposes of jury selection in a Texas capital case. The State's use of Section 12.31(b) clearly "dilute[s] the quality of community judgment represented by the jury", *Taylor v. Louisiana, supra,* 419 U.S. at 535, in an especially critical way. It deprives a defendant facing the death penalty of *Witherspoon*-qualified jurors in the jury's deliberation of the punishment questions.[18] Whatever else may be said about the Texas capital punishment procedure, it is not a mechanical procedure that strips the jury of discretion in deciding whether the defendant shall live or die to the extent that *Witherspoon*-qualified jurors are no longer necessary as components of a representative jury.[19] Texas capital case juries, from whose membership are struck persons qualified under *Witherspoon* but disqualified under Section 12.31(b), are no less organized to vote for the death penalty than was Witherspoon's jury. To protect against this invasion of an accused's right to a trial by jury guaranteed by the Sixth Amendment, *Witherspoon* must be held applicable to the Texas capital punishment procedure.

B.

In *Davis v. Georgia, supra,* this Court reversed a death sentence imposed under the Georgia post-*Furman* death penalty procedure because of the improper exclusion of a

[18]If the fiction is indulged that juries in Texas capital cases merely answer questions and do not assess punishment, the exclusion of *Witherspoon*-qualified jurors under Section 12.31(b) is more egregious because such an exclusion is based upon grounds wholly irrelevant to any task the jury is asked to perform.

[19]Venireman Jenson noted that if the Texas capital punishment procedure were devoid of discretion to the extent that human feelings should not be a part of the jury's sentencing function, it would be better to use computers instead of people as jurors. VD 370.

Witherspoon-qualified juror.

> Unless a venireman is "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings," 391 U.S. at 522 n. 21, he cannot be excluded; if a venireman is improperly excluded even though not so committed, any subsequently imposed death penalty cannot stand.

Id. at 123. Inasmuch as the Texas post-*Furman* death penalty procedure is qualitatively similar to the Georgia post-*Furman* death penalty procedure (for both procedures were approved in *Jurek* and *Gregg,* respectively, upon the same basis), any question as to *Witherspoon's* applicability to the Texas procedure should be controlled by the decision in *Davis.* The only distinction between the *Jurek*-approved procedure and the one approved in *Gregg* is that Texas vests greater and more absolute sentencing discretion in the jury than does Georgia,[20] giving greater compulsion for holding *Witherspoon* applicable to the Texas capital punishment procedure.

CONCLUSION

Despite early pronouncements of the Court of Criminal Appeals that "that *Witherspoon* test remains the same"[21] and "that the holding of *Witherspoon v. Illinois,* [*supra*], [is] alive and well in light of the new statutory scheme providing for the imposition of the death penalty",[22] that court has unmistakably buried *Witherspoon.* That court has improperly elevated Section 12.31(b) above the constitutional rule announced in *Witherspoon* and thereby permits the

[20]*See* n. 16 *supra.*

[21]*Hovila v. State, supra,* 532 S.W.2d at 294; and *see White v. State,* 543 S.W.2d 104, 106 (Tex.Crim.App. 1976).

[22]*Woodkins v. State, supra,* 542 S.W.2d 855, at 862 (Tex.Crim.App. 1976).

exclusion of *Witherspoon*-qualified jurors from capital cases. The Texas death penalty procedure does not justify abolition of *Witherspoon* nor the exclusion of prospective jurors who have general objections to capital punishment on the broader, Section 12.31(b) basis than is permitted by *Witherspoon.* For the reasons stated herein, and to faithfully adhere to the *Davis* decision, this Court should hold that *Witherspoon* is fully applicable to the Texas death penalty scheme, and the Court should apply *Witherspoon* in this case.

II.

Section 12.31(b) excludes a prospective juror from service in a capital case unless he will state "under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberation on any issue of fact."[23] The Court of Criminal Appeals has consistently held that this statutory requirement is wholly distinct from *Witherspoon.* A prospective juror in a Texas capital case may be disqualified from service by Section 12.31(b) regardless of whether he qualifies under *Witherspoon;* indeed, a prospective juror disqualified under Section 12.31(b) does not even have to be questioned as to the *Witherspoon* standards, *Bodde v. State,* 568 S.W.2d 344, 348 (Tex.Crim.App. 1978), because even if he qualifies under *Witherspoon* he may be excused upon the ground that he is disqualified under Section 12.31(b). *Whitmore v. State,* 570 S.W.2d 889, 892-893 (Tex. Crim.App. 1976).

[23]*See* footnote 2, *supra.*

Witherspoon permits the exclusion for cause of only those prospective jurors who make it

> unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt.*

391 U.S. at 522 n. 21. (Emphasis original). The specific holding of *Witherspoon* was that where venire members were excluded from jury service "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction", *id.* at 522, imposition of the death penalty violated the Due Process Clause of the Fourteenth Amendment.

The voir dire examination of prospective jurors in the petitioner's case reveals numerous instances where *Witherspoon* was violated through application of Section 12.31(b). Mrs. Francis Mahon said she had always been in favor of the death penalty and that its application in this type of case (murder of a police officer) was appropriate. VD 33-35. Mr. Forrest Jenson said he felt that society needed the death penalty, VD 351, and that he could personally vote for it, VD 354. Nelda Coyle had always been in favor of the death penalty, VD 1023, and could personnally vote for death. VD 1025. Bobbie Andrews believed in the death penalty, but did not want to have to vote for it herself. VD 2697. These venire members never retreated from their respective position favoring the death penalty.

However, each of these prospective jurors was eventually excused pursuant to Section 12.31(b) when they each indicated they could not swear, as required by Section

12.31(b), that the mandatory penalty of life imprisonment or death would not affect their deliberations on any fact issue. Juror Mahon first stated she did not feel that her fact deliberations would be affected by the mandatory penalties. VD 65. When pressed further, she only said that she just did not know as an absolute fact whether she would be so affected. VD 67. Because Mahon felt it *could* affect her, she stated she could not take the oath requiring her to swear unconditionally that it would not affect her. VD 68. Venireman Jenson felt he could not take the oath because the fact that the death penalty was a possible punishment meant to him that he could not "take it lightly" and that he would have to be "pretty certain" as to how he decided the facts. VD 367. Jenson stated that he could not swear he would not be affected because he was "just human like everybody else", VD 368, and that the prosecutor "might as well get a computer to sit on the jury" if personal feelings could not enter into the deliberations. VD 370. Like Mr. Mahon, Nelda Coyle indicated that she could not unequivocally state under oath that she would not be affected because she did not know for a fact whether she would be affected. VD 1064-1065, 1067. And to Bobbie Andrews, the possible penalty of death required that her "feelings" would enter into her deliberations. VD 2708. She therefore could not take the oath that her "feelings" would not affect her decisions as a juror in a capital case. VD 2719-2720.

Mrs. Lloyd White was in favor of the death penalty but did not want to be personally involved in its imposition. VD 1530. She could not take the oath required by Section 12.31(b) because she was not completely certain whether she would be affected by the mandatory penalties. VD 1536. Mr. Curtis Williams was equivocal throughout the voir dire examination as to his feelings about the death penalty in

general and his participation in the necessary fact determinations required by the Texas procedure. VD 2577, 2586-2588, 2592, 2596-2697. Because he thought his deliberations would be affected by the death penalty as a possible punishment, VD 2598, Williams was excused. Penny J. McDonald said she did not belive in capital punishment, VD 4496, but she indicated that she could vote for the death penalty under the proper circumstances. VD 4497-4498, 4506. McDonald said she would not be affected by the penalty in determining guilty or innocence, but she could not swear that she would not be affected in answering the three punishment questions. VD 4530, 4550-4551, 4559.

All of these prospective jurors were qualified under *Witherspoon*. It was never unmistakably established that any one of them was so irrevocably opposed to the death penalty that he would automatically vote against its imposition regardless of the evidence.[24] Prospective jurors Jenson, Williams and Andrews concluded that they would be affected by the mandatory penalty in some unexpressed way. Jenson, VD 370; Williams, VD 2598; Andrews, VD 2697. In contrast, Prospective jurors Mahon, Coyle, White and McDonald could not qualify under Section 12.31(b) only because they had no previous experience as jurors in a capital case and thus could not say for certain whether they would be affected in any way. Mahon, VD 67; Coyle, VD 1064-1065; White, VD 1536; McDonald, VD 4550-4551,

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[24]Although most of the prospective jurors were not directed by the prosecutor's interrogation to the application of Section 12.31(b) to the jury's deliberative function on the petitioner's guilt or innocence, prospective juror McDonald expressly stated that the mandatory penalty would in no way affect her deliberation as to guilt/innocence. VD 4530. She clearly passed the second exclusion test of *Witherspoon* in that the death penalty would not prevent her from making an impartial decision as to the defendant's guilt.

4559.[25]

Witherspoon, Boulden v. Holman, 394 U.S. 478 (1969), *Maxwell v. Bishop,* 398 U.S. 262 (1970), and *Davis v. Georgia, supra,* all involved prospective jurors who were in various degress opposed to capital punishment. The exclusion of prospective jurors Mahon, Jenson, Coyle and Andrews presents the most egregious violation of *Witherspoon* because each of these prospective jurors expressly *favored* the death penalty. This anomaly is due to the interpretation of Section 12.31(b) by the Court of Criminal Appeals. Without discussion or analysis, that court held for the first time in *Moore v. State, supra,* that Section 12.31(b) operated totally independent of the *Witherspoon* test. This holding was reaffirmed one week later in the court's original opinion in *Whitmore v. State, supra,* wherein the original majority said that it was "of no consequence" that a prospective juror was not qualified under *Witherspoon,* but excused under Section 12.31(b). Not until *Shippy v. State, supra,* did a member of the Court of Criminal Appeals contest the majority's disregard for *Witherspoon.* Recognizing the tension between *Moore* and its progeny, and *Witherspoon,* Judge Roberts noted in his dissenting opinion that to be 'affected' by the mandatory penalties prescribed by the statute is not necessarily an irrevocable commitment to vote against the death penalty in

[25]It would appear that prospective jurors Mahon. Coyle, White and McDonald would also have been unable to take the Section 12.31(b) oath had it been phrased in the affirmative, i.e, whether he or she could state "under oath that the mandatory penalty of death or imprisonment for life *would* affect [his or her] deliberations on any issue of fact." These persons simply did not know if they would be affected or, if so, how they would be affected. A brief review of the voir dire examination of these venire members will reveal that their indecisiveness was due in large part to their uncertainty as what exactly was meant by the term 'affect', which has yet to be defined by the Court of Criminal Appeals.

all cases, as is required before exclusion is permitted by *Witherspoon.*

> It is readily apparent that a person who generally objects to the death penalty because of conscientious and religious scruples against its infliction will have his determination of fact affected by such belief. But if such "affectation" does not amount to an unambiguous and irrevocable commitment to vote against the death penalty in all cases, such individual cannot be constitutionally challenged for cause under *Witherspoon.*

556 S.W.2d at 262.

Just this sort of constitutionally unacceptable 'affectation' that concerned Judge Roberts is reflected in the voir dire examination in this case. Neither the trial court nor the Court of Criminal Appeals equated Section 12.31(b) with *Witherspoon.* As a result, not only were venire members with mere conscientious or religious scruples against the death penalty removed from the jury panel in this case (those being White, Williams and McDonald), but four persons who were expressly in favor of the punishment were also excused (those being Jenson, Mahon, Coyle and Andrews). This absurd result at least serves to elucidate the ambiguity in the meaning of 'affect' as used in Section 12.31(b).

The application of Section 12.31(b) in the petitioner's case violated *Witherspoon* because the trial court excluded *Witherspoon*-qualified jurors from the petitioner's jury under Section 12.31(b), which is a broader basis for exclusion than is permitted under *Witherspoon.* 391 U.S. at 522 n. 21. The improper exclusion of any one of the aforementioned prospective jurors in violation of *Witherspoon* requires a reversal of the judgment of the Court of Criminal Appeals insofar as it imposes the death penalty. *Davis v. Georgia, supra.*

CONCLUSION

The voir dire examination in this case clearly discloses that several prospective jurors were excluded on a broader basis than is permitted by *Witherspoon*, to-wit: under Section 12.31(b). Under these circumstances, the imposition and carrying out of the death penalty in this case is volative of the Sixth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-5175

RANDALL DALE ADAMS,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

ON WRIT OF CERTIORARI TO THE
TEXAS COURT OF CRIMINAL APPEALS

BRIEF FOR THE RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-5175

RANDALL DALE ADAMS,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

ON WRIT OF CERTIORARI TO THE
TEXAS COURT OF CRIMINAL APPEALS

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals (A. 56)[1] is reported at 577 S.W.2d 717.

JURISDICTION

Petitioner's jurisdictional statement (Brief for the Petitioner at 1-2) is acceptable.

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[1]For convenience, Respondent, like Petitioner, will cite the Appendix as "A" and the transcript of voir dire examination as "VD", adding a reference to the Appendix if any portion of the voir dire examination cited also appears therein.

QUESTIONS PRESENTED

I. IS THE DOCTRINE OF *WITHERSPOON V. ILLINOIS*, 391 U.S. 510 (1968), APPLICABLE TO THE BIFURCATED PROCEDURE EMPLOYED BY TEXAS IN CAPITAL CASES?

II. DID THE EXCLUSION FROM JURY SERVICE IN THE PRESENT CASE OF PROSPECTIVE JURORS PURSUANT TO TEX. PENAL CODE ANN. §12.31(b) (VERNON) VIOLATE THE DOCTRINE OF *WITHERSPOON V. ILLINOIS?*

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner cites and sets forth a portion of the Sixth and Fourteenth Amendments to the United States Constitution.

Also involved are Tex.Penal Code Ann. §§12.31, 19.02, and 19.03 (Vernon); and Tex.Code Crim.Proc. Ann. arts. 35.15, 35.16, 35.17, and 37.071 (Vernon). These statutes are set forth below.

Tex. Penal Code Ann.

Sec. 12.31. Capital Felony. (a) An individual adjudged guilty of a capital felony shall be punished by confinement in the Texas Department of Corrections for life or by death.

(b) Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

Sec. 19.02. Murder. (a) A person commits an offense if he:

(1) intentionally or knowingly causes the death of an individual;

(2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of individual; or

(3) commits or attempts to commit a felony, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

(b) An offense under this section is a felony of the first degree.

Sec. 19.03. Capital Murder. (a) A person commits an offense if he commits murder as defined under Section 19.02 (a)(1) of this code and:

(1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman:

(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated rape, or arson;

(3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;

(4) the person commits the murder while escaping or attempting to escape from a penal institution; or

(5) the person, while incarcerated in a penal institution, murders another who is employed in the operation of the penal institution.
(b) An offense under this section is a capital felony.
(c) If the jury does not find beyond a reasonable doubt that the defendant is guilty of an offense under this section, he may be convicted of murder or of any other lesser included offense.

Tex. Code Crim. Proc. Ann.

ART. 35.15. Number of challenges. (a) In capital cases both the State and defendant shall be entitled to fifteen peremptory challenges. Where two or more defendants are tried together, the State shall be entitled to eight peremptory challenges for each defendant; and each defendant shall be entitled to eight peremptory challenges.

(b) In non-capital felony cases, the State and defendant shall each be entitled to ten peremptory challenges. If two or more defendants are tried together each defendant shall be entitled to six peremptory challenges and the State to six for each defendant.

(c) The State and the defendant shall each be entitled to five peremptory challenges in a misdemeanor tried in the district court and to three in the county court, or county court at law. If two or more defendants are tried together, each defendant shall be entitled to three such challenges and the State to three for each defendant in either court.

ART. 35.16. Reasons for challenge for cause. (a) A challenge for cause is an objection made to a particular juror. alleging some fact which renders him incapable or unfit to serve on the jury. A challenge for cause may be made by either the state or the defense for any one of the following reasons:

1. That he is not a qualified voter in the state and

county under the Constitution and Laws of the State; provided, however, the failure to pay a poll tax or register to vote shall not be a disqualification;

2. That he has been convicted of theft or any felony.

3. That he is under indictment or other legal accusation for theft or any felony;

4. That he is insane or has such defect in the organs of feeling or hearing, or such bodily or mental defect or disease as to render him unfit for jury service, or that he is legally blind and either the court or the state in its discretion or the defendant or the prospective juror in his discretion is not satisfied that he is fit for jury service in that particular case;

5. That he is a witness in the case.

6. That he served on the grand jury which found the indictment;

7. That he served on a petit jury in a former trial of the same case;

8. That he has a bias or prejudice in favor of or against the defendant;

9. That from hearsay, or otherwise, there is established in the mind of the juror such a conclusion as to the guilt or innocence of the defendant as would influence him in his action in finding a verdict. To ascertain whether this cause of challenge exists, the juror shall first be asked whether, in his opinion, the conclusion so established will influence his verdict. If he answers in the affirmative, he shall be discharged without further interrogation by either party or the court. If he answers in the negative, he shall be further examined as to how his conclusion was formed, and the extent to which it will affect his action; and, if it appears to have been formed from reading newspaper accounts,

communications, statements or reports or mere rumer or hearsay, and if the juror states that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that he is impartial and will render such verdict, may, in its discretion, admit him as competent to serve in such case. If the court, in its discretion, is not satisfied that he is impartial, the juror shall be discharged;

10. That he cannot read or write.

No juror shall be impaneled when it appears that he is subject to the second, third or fourth grounds of challenge for cause set forth above, although both parties may consent. All other grounds for challenge may be waived by the party or parties in whose favor such grounds of challenge exist.

In this subsection, "legally blind" shall mean having not more than 20/200 of visual acuity in the better eye with correcting lenses, or visual acuity greater than 20/200 but with a limitation in the field of vision such that the widest diameter of the visual field subtends an angle no greater that 20 degrees.

(b) A challenge for cause may be made by the State for any of the following reasons:

1. That the juror has conscientious scruples in regard to the infliction of the punishment of death for crime, in a capital case, where the State is seeking the death penalty;

2. That he is related within the third degree of consanguinity or affinity to the defendant; and

3. That he has a bias or prejudice against any phase of the law upon which the State is entitled to rely for conviction or punishment.

(c) A challenge for cause may be made by the defense for any of the following reasons:

1. That he is related within the third degree of consanguinity or affinity to the person injured by the commission of the offense, or to any prosecutor in the case; and

2. That he has a bias or prejudice against any of the law applicable to the case upon which the defense is entitled to rely, either as a defense to some phase of the offense for which the defendant is being prosecuted or as a mitigation thereof or of the punishment therefor.

ART. 35.17. Voir dire examination. 1. When the Court in its discretion so directs, except as provided in Section 2, the state and defendant shall conduct the voir dire examination of prospective jurors in the presence of the entire panel.

2. In a capital felony case, the court shall propound to the entire panel of prospective jurors questions concerning the principles, as applicable to the case on trial, of reasonable doubt, burden of proof, return of indictment by grand jury, presumption of innocence, and opinion. Then, on demand of the State or defendant, either is entitled to examine each juror on voir dire individually and apart from the entire panel, and may further question the juror on the principles propounded by the court.

ART. 37.071. Procedure in capital case. (a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall

not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

STATEMENT OF THE CASE

The Crime

The facts of the offense were correctly stated by the Texas Court of Criminal Appeals:

"Appellant was found guilty of the murder of Dallas police officer Robert Wood, who was fatally shot by the driver of an automobile he had stopped for failing to have on its headlights. The shooting occurred at approximately 12:30 a.m. on November 28, 1976, in the 3400 block of North Hampton Road in Dallas.

"The State's principal witness was David Harris, who at the time of the offense and trial was sixteen years of age. Harris testified that he ran away from his home in Vidor on November 26, 1976, after stealing money and a car from the house of a neighbor. He also took with him a .22 caliber pistol and ammunition.

"Harris drove to Houston, where he spent the night in a shopping center parking lot. On the morning of November 27, Harris drove to Dallas. In Dallas, Harris picked up appellant, who was hitchhiking. Harris and appellant spent the afternoon and evening of November 27 riding around Dallas in the car Harris had stolen, smoking marihuana and drinking beer. That night they went to a drive-in movie.

"Harris and appellant left the movie at approximately midnight. Appellant was driving. As they drove south on the street Harris later identified as Hampton Road toward the motel at which appellant was living, they were stopped by a police patrol car. Harris, fearing that he would be identified, slumped down in the front seat so that he would not be seen. As the officer, Robert Wood, approached the driver's window of the car, appellant reached under the front seat where he knew the pistol was located, removed the pistol, shot the officer several times, and rapidly drove away.

"After the shooting, appellant drove to his motel, where he and Harris separated. Harris spent the rest of the night in a parking lot, and then returned to Vidor. Harris spent the next several days with friends, to whom he stated that he had shot a Dallas police officer. Harris testified that he made this claim in an effort to impress his friends. Harris was arrested on December 5, 1976, for the theft of the car and was released to the custody of his parents. He was rearrested on December 20, after the Vidor police learned of the incriminating statements he had made with regard to the Dallas murder. Following this arrest, Harris gave a statement detailing his activities in Dallas and identifying appellant as the person who shot Wood.

"Appellant, in his testimony, admitted spending the day of November 27 with Harris. But appellant claimed that he and Harris left the movie at approximately 9:30 p.m. and that they separated at a convenience store next door to his motel. Appellant testified that he returned to his motel room no later than 10:00 p.m. and was asleep there at the time of the murder. Appellant's defensive theory was that Harris had shot Wood and was attempting to shift the blame to him."

* * *

"Officer Teresa Turko was Wood's partner. Turko

testified that she was standing near the right rear corner of the assailant's car at the time Wood was shot and that she saw only one person in the car. Turko could not identify this person since she saw only the back of his head, but she did testify that appellant's hair was the same color and worn in the same style as that of the man in the car. Turko also testified that Harris' hair was not similar in either color or style to that of the man she saw."

Adams v. State, 577 S.W.2d 717, 719, 721 (Tex.Crim.App. 1979). (A. 57-58, 61).

The Voir Dire Examination

Both the trial judge and the prosecutor carefully explained to each prospective juror the Texas law regarding capital punishment. After preliminary questioning, each venireman was informed of the nature of the case and the sentencing procedures prescribed by Texas law following a finding of guilt in the first stage of the bifurcated proceedings. Generally, even those jurors who were unalterably opposed to the death penalty and who stated that under no circumstances could they ever vote to inflict it were not excused on the basis of *Witherspoon v. Illinois*, 391 U.S. 510 (1968). Instead, the focal point of the inquiry was Tex. Penal Code Ann. §12.31(b) (Vernon). Typically, if a juror expressed his inability to impose the death penalty, he was not excused for cause unless it were also determined that he was unable to honestly and in an unbiased manner answer the fact questions that he was informed would automatically result in the imposition of the death penalty or life imprisonment.

Other jurors, who were not disqualified under the *Witherspoon* doctrine and even stated that they were in favor of the death penalty, were unable to take the oath prescribed by §12.31(b). A careful reading of the voir dire examination reveals that the inability of such a juror to take the statutory oath and thereby escape disqualification was a result of the juror's inability to assure the defense and the prosecution that he would

answer the three fact questions at the punishment stage of trial truthfully, and in accordance with the evidence adduced, even though he was aware that such an answer would automatically result in a sentencing result possibly abhorred by the juror -- whether death or life imprisonment. These jurors, that is, were unable to swear that their discretion in sentencing would be guided in the manner prescribed by the Texas law.

Thus, in many instances §12.31(b) was used as a means of *rehabilitating* jurors who could have been disqualified under *Witherspoon.* In other instances it was used as an alternative means of excluding jurors in addition to *Witherspoon.* In still other cases, it was the sole basis of exclusion. Petitioner has apparently selected ten jurors for challenge herein that he perceives as examples of the last group.

Mrs. Francis Mahon (VD 33; A.3).

Mrs. Mahon stated that she had always favored the death penalty "in certain types of cases" and that she had always been in favor of it. (VD 34; A. 3-4).

The prosecutor carefully explained the Texas sentencing procedures and the three statutory questions at the punishment phase of the trial. (VD 55-60). As frequently occurred during the voir dire examination, the trial judge did not hesitate to assist both the prosecutor and defense counsel in explaining the law when he felt that such an explanation might clarify matters for a venireman. There is no contention that any of the law was explained inaccurately to Mrs. Mahon or any other juror. (*E.g.*, VD 56). Both the judge and prosecutor explained that the Texas jury at punishment in a capital case only answers fact questions; it is "the Judge [who] must do the sentencing depending upon

what the jury's answers are," (VD 55), and that "the law", not the jury, fixes the punishment. (VD 56).

A second common pattern in voir dire examination is illustrated by the prosecutor's long hypothetical question to Mrs. Mahon. (VD 61-64; A. 4-5). Essentially, the prosecutor explained that a venireman was not qualified to sit on the jury unless he could also swear that he would answer the fact questions at the punishment stage of the trial truthfully, even though the juror also knew that he disagreed with the result that the law automatically attached to those answers:

Q: [By the prosecutor] But let me put you in a situation here and you tell me how you feel.

Let's assume that you listen to the evidence of a case, you were convinced from the evidence as were the other eleven jurors, that the Defendant was guilty, you found him guilty of capital murder. You now know that there's only one of two possible punishments, either the sentence of death or a sentence of life. You know that you're going to be asked those three questions at the close of the evidence in the Hearing. You listen to all the evidence in the second Hearing. You're convinced from the evidence presented to you in the trial that number one, he did act deliberately. Number two, there is this probability that he will commit future criminal acts of violence, based upon the evidence presented, and number three, you're convinced that he did act unreasonably in killing this victim, the evidence has convinced you of that. Therefore, the proper answers to these three questions would be yes, would it not?

A: [By Mrs. Mahon] At this point, I think yes. I don't know whether I would at a time like that,

would weigh the death penalty over life or not. I'm really -- I really just don't know.

Q: I'm coming to that in just a minute and I appreciate your candor on it. But are we to the point where in my hypothetical situation, are we to the point to where you're convinced that the evidence shows that the proper answers to those questions is yes, one, two, three?

A: Yes, I'm to that point.

Q: That's been proven. All right. But let's suppose on the other hand your own personal feelings were, for some reason known only to you, your own personal feelings, were that this man should not get the death penalty?

A: Well, there would have to be something that would give me that feeling, I think.

Q: Well, I don't know that there would be any cause for us to speculate right now but can you see where that might happen?

A: Well, it could happen, you know it could happen.

(VD 61-63; A. 4-5).

Mrs. Mahon had difficulty promising that her discretion at punishment would be guided by the factors enumerated in Texas law. She first stated that she believed she could answer the questions honestly (*id.*); upon further questioning, however, she said, "It might be difficult to disregard [the effects of my answers]" (VD 64; A.6); "Maybe I'll have to search me a little," (VD 65; A.7); and "I really do not know whether it would effect [sic] me or not when it came right down to it," (VD 67; A. 7-8). She finally concluded that she was unable to take an oath that she would be uninfluenced in the

manner proscribed by Texas law. (VD 70; A. 9). *Mr. Mr. Forrest J. Jenson* VD 348; A. 9).

Jenson was in favor of the death penalty because "I do feel that society has to have some deterrent to crime and as a result, probably capital punishment is the only means of deterrent that we have." (VD 351; A. 9). He did say, however, that he would "probably" have to classify himself within the group of persons who because of their experience, "personally could not be one to take pen in hand and write their name on that verdict form sentencing somebody to his death," (VD 352-53), as the prosecutor phrased it. Later, the prosecutor explained the sentencing scheme so that Jenson would understand that if he were selected for jury service, he would not actually vote for death, but would answer questions, and that "three yes answers qualifies a mandate to the Court to sentence the man to death," (VD 357). Subsequently in an effort to ascertain whether Mr. Jenson could take the statutory oath to honestly answer the fact questions in spite of his knowledge of the consequences, the prosecutor explained in unmistakable terms the moral dilemma that Jenson might face:

> Now, the dilemma comes when a juror, such as yourself or any other juror, may hear the case and may feel the Defendant is guilty but feels that this is the furtherest thing from a death penalty case, that I never -- this is not what I had in mind when I was thinking about a proper case for the death penalty. Never had something like this in mind. And, if allowed to, I would never vote for death in this case. And yet, I honestly feel the answers to the three questions should be yes, yes, yes. And so there is that personal conflict that you can find yourself in. It's a very real probability.
>
> * * *
>
> [I]n other words, in good conscious [sic] if you felt

like the guy should not die in the electric chair, then your conscious [sic] would not allow you to answer all three questions yes, even though you thought and were convinced that the evidence showed that the answer should be yes.

Do you see what I am talking about?

* * *

(VD 360, 361).

Jenson first agreed he could follow the law (VD 361), then vacillated (VD 362; A. 10), then optimistically stated that surely if he "personally thought" the defendant "ought to be saved" then "there's bound to one of three [questions] I wouldn't agree with so I would have to vote no on one of them," (*id.*).

Ultimately, Jenson confirmed that his answers to the questions would be affected in the manner described by his knowledge of the consequences of the answers. (VD 368-69; A. 13). He was excused for cause for that reason.

Mr. George C. Ferguson (VD 613; A. 14)

Ferguson had been opposed to capital punishment for most of his life. (VD 614-15; A. 14). Initially he stated that it would be "almost impossible" to vote for the death penalty (VD 615; A. 15) and that he didn't "believe" he could do it (VD 616; A. 15); he next admitted that he would have to automatically vote against the death penalty (*id.*). Notably, the prosecutor did *not* ask that the juror be excluded on *Witherspoon* grounds. Instead, the prosecutor in the manner described above went on to explain that in Texas, jurors do not vote for death, but answer fact questions. (VD 616-20; A. 15-17). Ferguson then admitted that he could not take the statutory oath. (VD 621; A. 18). The trial judge further explained the law and questioned the juror (VD 622-26; A. 18-19), learning that Ferguson could make no moral distinction

between answering fact questions with an automatic result and voting directly for that result:

> "Well, if you were putting me in a situation where I knew it was -- saw it was a yes answer to those three questions that, in effect, I would be doing the same thing as sending him to the electric chair." (VD 624-25; A. 19).

The prosecutor then asked to exclude the juror both upon the basis of *Witherspoon* and §12.31(b). (VD 625; A. 19). The trial judge's additional questions indicate that the juror was excluded on the latter ground. (VD 626, 629; A. 19).

Ms. Nelda Coyle (VD 1017; A. 19)

Ms. Coyle favored the death penalty "in certain circumstances. . .[e]ver since I can remember." (VD 1023; A. 20). The prosecutor explained the Texas sentencing procedure to her. (VD 1028-30). She admitted that she could not take the statutory oath to truthfully answer the fact questions (VD 1030-31; A. 20), but the careful trial judge refused to exclude her unless he were sure she understood the *meaning* of the oath. (VD 1031). Defense counsel attempted to explain the problem:

> "Now, do you follow me? Your factual determination of guilt or innocence -- in other words, you might not answer the questions, the three questions honestly because you want to save him or because on the other hand you might feel that the facts in your opinion justify a more severe punishment than the actual facts would set forth."

(VD 1044).

The trial judge then accurately explained Texas law to her himself. (VD 1046-55; A. 20-24). The trial judge explained at great length and in great detail that to

swear that she would not be "affected" by the possible punishment meant that she would truthfully answer the fact questions, regardless of the consequences of her answers:

THE COURT: You see, it would not be fair, to the Defendant for instance --

JUROR COYLE: I understand.

THE COURT: You see, to have a juror that might gauge a certain answer to get a certain result on punishment would not be fair.

JUROR COYLE: I understand.

THE COURT: And the same to the State. So that is why we have to have this assurance from the juror that there is no question in your mind but what you could follow the law and not be affected in you deliberations by the punishment.

(VD 1052-53; A. 23).

Ultimately, after giving contradictory answers (*e.g.*, VD 1060), Ms. Coyle was excluded for cause because she could not take the statutory oath. (VD 1070).

Mrs. Lloyd White (VD 1525; A. 25)

Mrs. White gave several contradictory responses as to her feelings about capital punishment, but ultimately succinctly stated her opinion as follows: "I think I believe in capital punishment but I don't want to have anything to do with it, is that clear?" (VD 1530; A. 26). The prosecutor further inquired as follows:

Q: [By Mr. Tokley] All right. You believe in capital punishment but you personally could never sit

in a case which would call upon you to make decisions that could lead to a man's death?

A: [By Mrs. White] Uh-huh.

Q: That is your feeling?

A: Yes.

(VD 1530-31; A. 26-27). No *Witherspoon* objection, however, was offered. Instead, both the prosecutor (VD 531-38; A. 27) and then the trial judge explained the Texas sentencing procedures to Mrs. White:

THE COURT: Now, if you answer all three of those questions yes then he gets the death penalty. If you answer any of those questions no then he gets life imprisonment. So you don't directly vote life or death but you indirectly vote life or death depending on your answers to those questions

Do you follow me?

JUROR WHITE: Yes, I think I do.

THE COURT: In other words, during the whole trial nobody is ever going to ask you should he get life or should he get death if he is convicted. If he is found guilty of capital murder all that is going to happen in the punishment hearing is you are going to be asked as the jury to answer the three questions and your answers to those questions will then decide legally whether he receives the death penalty or life imprisonment.

Now, the law says that a person who is on a jury, when they are given

those three questions, if he is convicted of capital murder then go back and deliberate your verdict on those three questions. Now, a juror to be qualified to serve on a case has got to be in a position where they can truthfully and objectively listen to the evidence and answer those questions the way the juror thinks the questions ought to be answered. Okay?

JUROR WHITE: Uh-huh.

THE COURT: You cannot go back in the jury room and say, well, I want him to get life imprisonment so I am going to answer the questions no. You have got to answer the questions the way the evidence tells you it ought to be answered without any regard to what punishment would result.

(VD 1539-42).

The juror was unable to take an oath that her deliberation would not be affected in the manner described. (VD 1545; A. 28). She briefly changed her mind and stated that she "guess[ed]" she could answer the fact questions truthfully (VD 1547; A. 28), but then unequivocally reasserted her inability to take the oath:

MS. JAMES: Your Honor, I again object to this question, it's been asked and answered on the first go-around. I think they finally did answer the first time they went around. She did not think her fact deliverations would be unequivocally --

JUROR WHITE: Well, I don't think -- I think that was wrong.

THE COURT: Your objection is overruled.

JUROR WHITE: I think I answered wrong. I think I have got to go back the other way now.

THE COURT: Well, that is what we are trying to find out.

JUROR WHITE: Now, am I making myself clear now?

* * *

(VD 1558-59, *see* 1562-63; A. 29, *see* 29-30).

Thus, Mrs. White was excused for cause for inability to take the statutory oath. (VD 1563; A. 30).

Mr. Curtis Williams (VD 2571; A. 30).

Mr. Williams was the most vacillating of all the challenged jurors. Initially he was unable to say whether he favored capital punishment:

Q: [By the prosecutor] Okay. Can you tell us how you feel?

A: [By Williams] I think a person should be punished if they have done wrong.

Q: What about capital punishment, the ultimate punishment?

A: First, killing another person, killing someone, I don't know about that. I don't know.

Q: Let me ask you this: Are your feelings such that you don't really know how you feel about it?

A: I just don't know how I feel.

(VD 2576; A. 30).

He stated several times that he didn't think or believe that he could vote for the death penalty and that he felt that way "pretty strongly," (VD 2587; A. 31). At one point he finally stated that he could not vote to impose the death penalty:

A: [By the witness] Well, like I've told you, if a guy that killed somebody -- I can see him receiving a sentence or something like that, but I don't think I could just -- depending on me to say, "Kill this guy," I don't think I could do that.

Q: [By the prosecutor] When you say "I don't think" are you saying you couldn't do it?

A: I can't do it.

Q: All right. I think we've finally broken the ice.

(VD 2591-92; A. 32-33). Williams retreated to his ambivalence, however. (VD 2595-98; A. 33-34).

Because of his uncertainty, Williams admitted that he didn't know if he could follow the law and answer the fact questions truthfully. (VD 2595, 2597-98, 2602-03; A. 33-35). He was successfully challenged for cause by the prosecution for that reason. (VD 2604).

Mrs. Bobbie Andrews (VD 2692; A. 35)

Mrs. Andrews stated that she was in favor of the death penalty, but like Mrs. White before her, she absolutely under no circumstances could participate in imposing the death penalty personally. (VD 2697; A. 35). The prosecutor then offered to exclude her on the apparent basis of *Witherspoon*, but the trial court instructed him to inquire under §12.31(b). (VD 2697-98; A. 35). The Texas procedures were then explained to her by both the

prosecutor (VD 2698-2700) and the trial judge. (VD 2701-06; A. 35-36). The trial judge also delineated the meaning of the statutory oath:

> To give you a brief example, a Juror might be back in the jury room and may very well feel the answer to each of those three questions should be yes but over here in the back of his mind hovers the fact that "Well, if I vote yes, he is going to die in the electric chair." A juror may very well feel "I should answer a question no under the evidence, because the true answer is no," but he may feel the crime is so bad the Defendant should die in the electric chair and would be influenced to vote yes instead of no.
>
> The question Mr. Scott is putting is, if you were on the Jury, could you answer all of the questions you're asked in the Court's charge, answer all those based solely on evidence you hear? Or, on the other hand, would the punishment of death or life affect your deliberations on these different issues. If that would affect your deliberations on these different issues, you're not qualified. If it would not affect your deliberations, you're qualified. It's that simple -- it's not simple, but that's the way I'm trying to explain.
>
> We come back to statutory Article 1231 [sic]; if you are on this Jury could you give us your unequivocal assurance that the punishment of life or death would not affect your deliberations on any fact issues in this case?
>
> THE WITNESS: I don't believe I could give you my unequivocal assurance.
>
> * * *
>
> THE COURT: It would not be right to the Defendant, for instance, if a Juror felt, after hearing all the evidence,

"By golly, he ought to die in the electric chair" and went back there and answered those questions yes to see to it by the answers that he got death. Do you see what I mean?

THE WITNESS: Uh-huh.

THE COURT: Those questions are not geared to letting the Jury manipulate the answers. The answers have to be honest. Nobody has any quarrel with the way you feel. If you will be affected, not be affected, or you don't know. It's that simple.

So let me give you the question one more time. Would the mandatory punishment of death or life affect your deliberations on any fact issue in this case?

THE WITNESS: (Pause.) I have to say it would.

(VD 2703-06; A. 35-36)

Defense counsel's attempt to rehabilitate the juror focused on *Witherspoon*, not §12.31(b). Mrs. Andrews reiterated that she favored the death penalty in extreme cases (VD 2708; A. 36), but in "no situation," as defense counsel phrased it, could she "set aside your own feelings and feel the right of the State to administer punishment prevailed over your own individual feelings," (VD 2709). She repeatedly and consistently adhered to this position (VD 2719-20; 2726-27; A. 37, 38), emphasizing that as a result her fact deliberations would be affected in the manner described (*id.*).

Because the witness could not take the required oath to answer honestly, she was excused for cause. (VD 2727; A. 38).

Mr. Anthony Giuffrida (VD 4443; A. 38)

Mr. Giuffrida, like Mrs. White and Mrs. Andrews, favored the death penalty, "but to actually put my hand to it, I don't think I could. I don't think I could." (VD 4448; A. 38). He repeatedly stated that he very much doubted whether he could vote to impose the death penalty, and enthusiastically agreed that his answers to the fact questions might be affected by this reluctance. Both the prosecutor (VD 4450-59; A. 39-41) and defense counsel (VD 4459-61; A. 41) explained Texas law in detail to the venireman, including the aspect that jurors in capital cases answer fact questions with automatic consequences rather than vote for death or life imprisonment (VD 4453-54, 4456-57, 4461; A. 40, 41). He was unable to make any moral distinction between voting for death and answering fact questions resulting in death. (VD 4456; A. 40). Thus, he was excused for cause. (VD 4258-59, 4464; A. 41).

Penny L. McDonald (VD 4492; A. 42)

Ms. McDonald was opposed to capital punishment. (VD 4496; A. 42). She stated, however, that she might be able to impose the death penalty in a proper case. (VD 4506; A. 43).

The punishment phase of trial was then explained to the juror. (VD 4522-29). The prosecutor particularly explained that under the Texas statutory scheme, jurors no longer have unbridled discretion upon punishment, but instead are closely guided in their deliberations by the fact questions:

> Some jurors tell us that unless I have the discretion to either decide whether he got death or life and simply was I able to write out that word death or life, I cannot. My conscience will not allow me to lose that discretion and, therefore, I can't sit on this jury because the

way the law is presently set up does not give me any discretion at all. It requires me to answer those questions yes or no, and it requires me to honestly answer those three questions -- and some jurors say I can easily see where it might well be answering those three questions yes, meaning he is going to die, and I personally feel to my sense of justice, for some reason, either because of his part that he played, either because of some mental illness, that I detect from the evidence or for any number of reasons; but because my sense of justice tells me that this man should not die, and I cannot allow him to die at my hand -- sign the verdict form, and yet if I'm put upon that jury, I can see how I could be faced with the possibility of answering all three questions yes. So I can't serve because the law has taken away that discretion from me, to grant my feelings about what he really ought to get, as opposed to what he is going to get.

* * *

(VD 4524-25). The prosecutor explicitly stated:

> The problem comes when a juror or individual on the jury comes into conflict between what he thinks a man ought to get and what he is going to get by the answers of those questions.

(VD 4524).

Initially Ms. McDonald stated that her duties as a juror to answer the fact questions truthfully posed no dilemma (VD 4525), but she quickly admitted that in fact she would have difficulty answering the questions solely on the basis of the evidence. (VD 4527-40; A. 43).

Next the trial court explained the matter in very similar terms:

THE COURT: The whole trial is one whole fact finding process. The first fact that you have got to find is whether or not he is guilty or not guilty.

If you find him guilty, you then as a jury, go into a fact finding process of whether or not he fits in that category. Now, since it is solely a fact finding process, your duty is to find the facts and to not replace what the legislature -- in other words, the legislature says that if a person fits these three facts, he dies. It's not right for a jury to go back and say -- gee, I know they proved it beyond a reasonable doubt. I know I should answer yes to all of the questions, but I personally think he ought not to get death in this case, so I'm going to answer -- I'm not going to answer the three questions yes. I'm going to answer one no to keep him from getting death.

MS. MCDONALD: I get the impression that if we find the Defendant guilty and get back there and have three questions, it's only natural each one is going to answer all yes. How else are you going to answer that because all these questions about the death penalty and how I feel about it.

THE COURT: You see, what the law contemplates is that when you're on the jury and when you are deliberating on those three questions, if you find him guilty -- you never get those questions until you find him guilty. When you deliberate on those three

questions, that you will put out of your mind anything about death or life, that you will answer those three questions based upon the evidence that you heard during the trial without any regard to what the punishment might be.

Now, the law says that you're not qualified to be on this jury unless you can assure us that you will answer those three questions and any other fact questions in this case without any regard to the punishment, because if you let that punishment influence your finding of those questions, then you have circumvented what the legislature said.

The legislature said that all you do is to find facts and your findings must be based solely on the evidence that you heard during the trial, and you don't distort or twist your answers to those facts based upon what you think the punishment should or should not be. Do you follow me?

(VD 4532-34).

The trial judge explained that the oath required a venireman to affirm that he would be truthful and unbiased as to all questions of fact at both the guilt or innocence and punishment stages of trial:

It's the same on the guilt or innocence part. Let's say the State proved this Defendant's guilt beyond a reasonable doubt, of capital murder.

And you are back there deliberating and you say to yourself -- he is guilty. He is guilty as sin, and I know he is guilty, and they have proved it way beyond a reasonable doubt, but if I find him guilty, and he is going to get life or death, and I don't think he deserves that much punishment, if you get influenced, you see, in your finding of guilt or innocence based upon the punishment, on what the punishment could result in, then you, in effect, have defeated the intent of the legislature and you're not doing your duty.

All Mr. Scott is asking you is would you be able as a juror to answer all of these questions on the guilt or innocence without any regard to the punishment that would result?

(VD 4534-35).

Again Ms. McDonald initially stated she could base her punishment answers solely upon the evidence (VD 4534; A. 43-44), and again she quickly vacillated and gave contradictory responses (VD 4536-43; A. 44).

In the end, she could not take the oath to be unaffected in the manner described (VD 4550-51, 4555-57; A. 44-45, A. 46-47). Again it was explained to her that she was required to answer truthfully the fact questions in spite of her feelings about capital punishment. (VD 4558-59). She stated that she could not take such as oath "and be honest about it." (VD 4559, 4563, 4567-68; A. 47-49). She was excluded for that reason (VD 4568, 4571).

Mrs. Dorothy G. Riddle (VD 4920; A. 49).

Mrs. Riddle was in favor of the death penalty and initially stated that she believed she could vote to impose it in a proper case. (VD 4922, 4925; A. 49, 50). After further questioning, however, she agreed that she could

not, as the prosecutor said, "personally make decisions that would result in this man's death," (VD 4928-29; A. 50), thus aligning herself with Mrs. White, Mrs. Andrews, and Mr. Giuffrida.

The prosecutor did not move to exclude her, but instead stated, "All right. Let me go over -- I have got to go further with you about that." (VD 4929). He explained the Texas sentencing scheme in capital cases (VD 4929-33). The meaning of the statutory oath was clearly stated:

> Can you see the problem there where you -- the evidence points to three yes answers, which if you answer them yes are equivalent to the death penalty; but on the other hand, your own personal feelings are such, based upon something you heard in the case that he should not receive the death penalty.
>
> Okay. In talking to folks there are a number of folks who just could not set their personal feelings aside knowing that answering those three questions is going to result in a man's death. They could not do it. It would violate their conscience, and it would bother them to a point they simply could not answer all three of those questions yes even though the evidence called for yes answers. Or to put it another way, the mandatory sentence of death or life involved in the case would affect their deliberations on these issues of fact in the case.

(VD 4932-33).

At first Mrs. Riddle stated that she could answer the fact questions truthfully on the basis of the evidence (VD 4933-35; A. 50-51). Ultimately, however, she admitted that she could not:

Q: [By the prosecutor] So you are saying then that if you were selected on this jury and if you were convinced that the Defendant was guilty and if you were convinced that the evidence indicated that the proper answer to the three questions was yes that you could answer all three questions yes knowing full well that it would result in this man's death. Can you tell us that?

A: [By Mrs. Riddle] Yes, until you said it that way.

Q: That's the way it is. We are not talking about in the abstract. We are not talking about some philosophical situation.

A: I know it.

Q: We are talking about a real life case and real life decisions that could, if the facts and circumstances called for it, result in a real person's death. And don't feel like -- don't feel like you have to prove something to yourself or to us by saying I can do it.

A: Yeah.

Q: If you honestly feel like you can't do it, then you are a much better citizen for telling us than leading yourself and leading us to think that you can and then having these horrible doubts that linger all the way through the trial.

* * *

A: I will say no just like the first time.

* * *

(VD 4935-36; A. 51-52). She added that now she was sure about her answer (VD 4937; A. 52).

Defense counsel next carefully explained to Mrs.

Riddle that the meaning of the oath was not that the juror was "forbidden to have feelings," (VD 4943) or to be "a machine without feelings," (VD 4942) but that she must simply swear that "you can set aside your feelings such that you can just look at the question and answer it straight without reading something else into it -- well, I'm afraid of the death penalty or I want this guy to get death, as some people would," (VD 4942).

Ultimately, Mrs. Riddle was excused for cause because she could not so swear as required by §12.31(b). (VD 4943, 4947).

SUMMARY OF ARGUMENT

It could be argued that the doctrine of *Witherspoon v. Illinois*, 391 U.S. 510 (1968) should not apply at all to the sentencing procedures employed by Texas in capital cases. *Witherspoon* and its progeny were decided in an era of unguided and standardless jury sentencing in death cases. In order that the conscience of the community might fairly be reflected in such cases, it was necessary that jurors not be excluded upon the basis of their opposition to the death penalty unless it were also established that their opposition were such that they would automatically and invariably vote against the death penalty, or that their deliberations upon any question of fact would be affected by their feelings about the death penalty. At that time, juries in capital cases typically answered fact questions only upon guilt or innocence, not punishment.

In Texas, however, juries at the sentencing stage of the bifurcated trial are given specific guidelines as to the imposition of the death penalty, although it is true that a wide range of evidence is admissible insofar as aggravating and mitigating circumstances are concerned. Under a Texas statute, Tex. Penal Code Ann. §12.31(b) (Vernon), prospective jurors are informed

during the voir dire examination that they need never vote either for or against the death penalty at the sentencing stage of trial; under Texas law, they only answer the questions of fact set forth in Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon). It is the law that attaches the automatic consequence of death or life imprisonment according to their answers. Under such a statutory scheme, it is possible that some jurors who might be unalterably opposed to the imposition of the death penalty might nevertheless be morally capable of truthfully answering fact questions in accordance with the evidence. A strong case could be made that these jurors are qualified for service because they, too, represent the community conscience.

Historically, however, and in light of Texas case law, this conclusion seems insupportable. First, a Texas statute has been construed as independently supporting the *Witherspoon* doctrine as a ground for exclusion of jurors in capital cases. Prospective jurors were thusly excluded in Texas prior to *Witherspoon*. Second, the Texas Court of Criminal Appeals has frequently applied *Witherspoon* in death penalty cases.

Nevertheless, it is apparent that the pre-*Furman* case of *Witherspoon* is particularly inappropriate fopr the post-*Furman*, *Jurek*-era sentencing procedures in Texas death cases. Section 12.31(b) provides a more meaningful vehicle to assure unbiased juries in capital cases. That statute is not a broader basis of excluding jurors against the death penalty than that allowed in *Witherspoon*. Instead, it is a statute wholly neutral with respect to veniremen's attitudes about the death penalty. This is true both in theory and in fact.

Study of the voir dire examination in the instant case reflects that most of the jurors excluded upon the basis of which Petitioner complains were actually in favor of the death penalty. Their attitudes toward the death

penalty ran the gamut from strong approval to unalterable opposition. The significant characteristic common to all of them was their professed inability to take an oath that their deliberations upon any question of fact, whether at the guilt-innocence or punishment stage of the bifurcated trial, would not be "affected" by their knowledge of the necessary consequences of their answers to the questions.

The trial judge, prosecutor and occasionally defense counsel carefully explained to the veniremen the dual meaning of the oath. First, each prospective juror must swear that at both the guilt or innocence and punishment stages of trial, he will be guided in his deliberations upon questions of fact by the factors enumerated in the law and that he will base his answers solely upon the evidence. Second, and as a consequence, the oath requires him in effect to swear that he will not lie at either stage of trial and dishonestly answer fact questions in order to achieve an abstractly desired result of life imprisonment or death. At Petitioner's trial, if a prospective juror could not thusly vow to follow the law as promulgated by the Texas Legislature and approved by this Court, then the juror was properly excluded.

Another extraordinary aspect of the voir dire examination at Petitioner's trial illustrates why §12.31(b) properly applied not only does not violate *Witherspoon*; it achieves the *Witherspoon* goal of a fair jury more effectively than *Witherspoon* alone ever could in Texas. When a venireman appeared to be disqualified under *Witherspoon*, the prosecutor commonly did not seek exclusion, but instead, sometimes at the suggestion of the trial judge, went on to explain that a Texas juror in a capital case never actually votes for death or life imprisonment, but only answers fact questions with known automatic results. *Then* the prosecutor asked whether the venireman's opposition to the death penalty

would preclude unbiased deliberations. If the venireman continued to insist that he could not answer the fact questions fairly or honestly, only then did the prosecutor move to exclude him.

Thus, §12.31(b) was not generally used as a means of excluding jurors opposed to the death penalty less than to the extent necessary to support *Witherspoon* exclusion. On the contrary, it is more accurate to say that §12.31(b) was used as a means of *rehabilitating* those veniremen who in light of the unique sentencing procedures in Texas might otherwise have been excluded under *Witherspoon*. In this sense, it may be said that *Witherspoon* is an inappropriate means of safeguarding the capital defendant's rights in Texas; §12.31(b) more meaningfully assures a fair jury. Petitioner should not be heard to complain of the statute's application at his trial.

This Court's recent decision in *Lockett v. Ohio*, 438 U.S. 586 (1978), strongly supports the application of §12.31(b) at Petitioner's trial. *Lockett* emphasized that nothing in *Witherspoon* or any other case mandates that the prosecution must accept for jury service jurors who will be biased upon issues of fact. In *Lockett*, the issues of fact were those necessary to decision in the guilt or innocence stage of trial because under Ohio law, that was the only stage in which the jury participated. But in a state like Texas, where fact questions and a jury are involved at the punishment stage of the trial, the reasoning of *Lockett* should be fully applicable. Neither justice nor the defendant's rights can possibly be served by seating biased jurors at the punishment phase of a Texas trial, anymore than those interests would have been served by seating biased jurors at the guilt stage of *Lockett's* Ohio trial.

ARGUMENT

I. THE DOCTRINE OF *WITHERSPOON V. ILLINOIS*, 391 U.S. 510 (1968), APPLIES TO THE BIFURCATED PROCEDURE EMPLOYED BY TEXAS IN CAPITAL CASES.

In light of *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and its most notable progeny, *Boulden v. Holman*, 394 U.S. 478 (1969), *Maxwell v. Bishop*, 398 U.S. 262 (1970), and *Davis v. Georgia*, 429 U.S. 122 (1976), there is a sound argument that the *Witherspoon* doctrine is peculiarly inapplicable to the Texas capital punishment sentencing scheme embodied in Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon) and Tex. Penal Code Ann. §12.31 (Vernon). That is, the general inappropriateness of the *Witherspoon* doctrine to some types of "guided discretion" sentencing schemes enacted in the wake of *Furman v. Georgia*, 408 U.S. 238 (1972) is particularly well illustrated by examination of the Texas scheme analyzed and upheld in *Jurek v. Texas*, 428 U.S. 262 (1976). Yet the conclusion that *Witherspoon* is inapplicable to Texas capital punishment procedures seems insupportable in light of the Texas experience and case law.

A. Logically, the *Witherspoon* Doctrine May Be Inapplicable to the Bifurcated Procedure Employed by Texas in Capital Cases.

At the time *Witherspoon v. Illinois*, 391 U.S. 510 (1968), was decided, most death penalty statutes were of the unguided discretion type approved in *McGautha v. California*, 402 U.S. 183 (1971). In that case, McGautha argued "that the absence of standards to guide the jury's discretion on the punishment issue is constitutionally intolerable" and "fundamentally lawless," 402 U.S. at 196.
The Court concluded otherwise:

> In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.

402 U.S. at 207.

It is reasonable to infer from the Court's discussion that a saving basis of the California and Ohio statutes was the holding in *Witherspoon v. Illinois*, which protected capital defendants from the worse excesses of standardless jury sentencing. Illinois law had allowed prospective jurors with conscientious scruples against the death penalty to be challenged for cause by the prosecution. The expressed rationale for this basis of challenge was that a juror with religious or conscientious scruples against capital punishment "might hesitate to return a verdict inflicting such punishment," *People v. Carpenter*, 150 N.E.2d 100, 103 (Ill. 1958), *quoted in Witherspoon v. Illinois*, 391 U.S. at 513 n. 2. Upon that basis nearly half of the entire jury panel — forty-seven of ninety-five veniremen — was excluded for cause. It would be difficult to maintain persuasively that the resultant jury panel would not have been more likely than a more inclusive sample of the population to impose the death penalty, although one certainly might with the dissenters — Justices Black, Harlan, and White — question the majority's characterization of the resultant jury as "a jury uncommonly willing to condemn a man to die," 391 U.S. at 521, a "hanging jury," 391 U.S. at 523, or a jury amounting to a "stacked deck," *id.*

Significantly, in the famous footnote 21, the Court noted among other things that nothing precludes a state from excluding veniremen whose "attitude toward the death penalty would prevent them from making an im-

partial decision as to the defendant's *guilt*," 391 U.S. at 522 n. 21 (emphasis in original). It is submitted that this statement embodies the wholly obvious proposition that neither the defendant nor the prosecution is powerless to exclude for cause any juror who cannot be unbiased or unprejudiced with respect to any issue of fact.

In the pre-*Furman* era, such issues of fact were encountered only at the guilt or innocence stage of trial. As a result of *Furman v. Georgia*, that is no longer true. As discussed in *Jurek v. Texas*, 428 U.S. 262 (1976), Texas employs a bifurcated criminal trial procedure in capital as well as other cases. Tex. Code Crim. Proc. Ann. arts. 37.07, 37.071 (Vernon). In a capital context the jury must first find at the guilt or innocence stage of trial that the defendant has committed murder as defines in Tex. Penal Code Ann. §19.02 (Vernon), and further that he has committed it under one of the five aggravating circumstances enumerated in §19.03: *i.e.*, that he murdered a peace officer or fireman; that he murdered in the course of kidnapping, burglary, robbery, aggravated rape, or arson; that he murdered for remuneration; that he murdered while escaping from custody; or that he murdered a prison or jail guard. *See Jurek v. Texas*, 428 U.S. at 268.

If the defendant is found guilty of capital murder, then the same jury conducts a punishment hearing. At that hearing, the jurors do not directly vote for a sentence of either death or life imprisonment, although they were informed during the voir dire examination "that a sentence of life imprisonment or death is mandatory on conviction of a capital felony." Tex. Penal Code Ann. §12.31(b) (Vernon). Instead, the jury is required to answer three fact questions:

(1) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Tex. Code Crim. Proc. Ann. art. 37.071(b) (Vernon). If the jury affirmatively answers all three questions, then the trial judge automatically assesses punishment at death. If at least ten of the twelve jurors agree that the answer to at least one of the questions is "no," then the sentence of life imprisonment automatically results. Arts. 37.071(c), (d), and (e). *See Jurek v. Texas*, 428 U.S. at 269.

The entire Texas scheme was upheld essentially for two reasons. First, the jury is carefully guided in its sentencing discretion by the terms of the Texas statutes. Thus, the arbitrary and capricious imposition of the death penalty condemned in *Furman v. Georgia* was avoided. Second, the Texas Court of Criminal Appeals held that an extremely wide range of mitigating evidence was admissible at the punishment phase of trial so that the convicted defendant might have the opportunity to show why the death penalty should not be imposed. *Jurek v. State*, 522 S.W.2d 934 (Tex.Crim. App. 1975), *aff'd*, 428 U.S. 262 (1976); *Smith v. State*, 540 S.W.2d 693 (Tex.Crim.App. 1976), *cert. denied*, 430 U.S. 922 (1977).

Thus, the sentencing scheme in Texas capital cases is constitutional because the jury answers fact questions that are sufficiently broad and inclusive insofar as relevant mitigating factors are concerned that the jury is required to act as the conscience of the community. A distinctively crucial feature of the entire scheme is that the jury itself *does not vote to impose any penalty*.[2] Under Tex. Penal Code Ann. §12.31(b) (Vernon):

> Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

Hence, although jurors know the necessary effect of their answers to the fact questions, the jurors themselves never vote for death or life imprisonment. It is the law that attaches either consequence to the answers to the fact questions.

Logically, it would seem that a juror's abstract feelings about capital punishment, regardless of the depth of his convictions, is an insufficient basis for exclusion from jury service. That is, under *Witherspoon* a juror who states that he is unalterably opposed to the death penalty in such a manner that he would automatically vote against it in every case regardless of the circumstances and in no case could he ever consider imposing such a penalty, is excludable for cause.

But in Texas it is arguable that such a juror should not necessarily be disqualified. The examination should continue and the Texas scheme should be carefully ex-

[2]Cf. the Georgia statute discussed in *Davis v. Georgia*, 429 U.S. 122 (1979), and *Gregg v. Georgia*, 428 U.S. 153 (1976). *See*note 9, *infra*.

plained to the juror so that he understands that he does not actually vote for the death penalty. Instead, he merely answers such questions as whether there is a probability that the convicted defendant will continue to commit future acts of violence against society.

It is not unlikely that there is a discrete group of jurors who might be unable morally, ethically, religiously, or philosophically to directly send a human being to his death by virtue of signing or voting for a death verdict, but nevertheless be able to take an oath to honestly and fairly answer questions of a factual nature about the convicted defendant. Such a hypothetical juror might well rationalize the apparent inconsistency in his position by espousing the not wholly unreasonable view that in spite of his "unalterable" opposition to the death penalty, by doing his duty as a citizen and truthfully answering fact questions about a defendant, it is not he who condemns the accused to die, but the law. It is not he who decides that the convicted murderer is to be executed; he has merely decided that as a factual matter, the murderer has killed deliberately, in an unreasonable response to provocation, and that he will continue to commit future acts of violence against society. Such a juror might consistently answer the fact questions honestly and at the same time express moral outrage at the consequence the law has necessarily attached to his answer to those fact questions.[3]

The same ethical dilemma might be resolved in like manner for the biblically oriented juror posited by Mr. Justice Black dissenting in *Witherspoon*, 391 U.S. at 536. This juror adheres literally to the admonition of

[3]It is worth remembering that, "The critical question, of course, is not how the phrases employed in this area have been construed by courts or commentators. What matters is how they might be understood — or misunderstood — by prospective jurors." *Witherspoon*, 391 U.S. at 515 n.9.

"an eye for an eye" and is conscientiously or religiously opposed to *not* inflicting the death sentence on any person convicted of capital murder. Yet it is possible that this juror, even though he could never affirmatively vote for life imprisonment or any other sentence except death for a convicted murdered, might nevertheless truthfully answer that he did not believe that the murderer would commit future acts of violence against society. Again, such a juror in his own moral scheme may be blameless if it is the law that attaches an inappropriate or even abhorred consequence to his truthful answer.

Just as *Witherspoon* may exclude some veniremen who perhaps should be qualified to serve on a Texas jury in a capital case, so also it is ineffective to weed out some jurors with attitudes toward the death penalty quite inimical to a fair trial. A less dramatic but perhaps more common example than those set forth above may serve to illustrate this fact.

Many jurors, wholly apart from their attitude toward the death penalty, are unable or unwilling to subjugate their own desires and allow their discretion in sentencing to be guided in the manner prescribed by Texas law. They believe that they should have free rein to impose death or life imprisonment as they see fit and that the statutory questions designed to guide their exercise of discretion are merely obstacles in this process.

Such veniremen, some of whom appeared at Petitioner's trial, were qualified to serve on a pre-*Furman* jury and *Witherspoon* did nothing to exclude them. Now that such veniremen are not qualified to serve to the extent that they will be biased in their deliberations of fact, *Witherspoon* still does not operate to exclude them.[4]

[4]Only Tex. Penal Code Ann. §12.31(b) (Vernon), and possibly Tex. Code Crim. Proc. Ann. art. 35.16 (b)(3), (c)(2) (Vernon), accomplish this result.

Thus, as a logical matter, in Texas perhaps no juror should be excluded merely because he is either unalterably opposed or invariably in favor of the death penalty as a punishment for capital murder. Instead, any such juror should be qualified to sit on a Texas jury if he can state under oath that his deliberations on any matter of fact, whether at the guilt-innocence or punishment stage of trial, will not be affected in the manner described by his knowledge of the consequences that the law attaches to the outcome of those deliberations. As forceful as this conclusion may seem, it is insupportable in light of the Texas experience and case law.

B. The Texas Experience and Case Law Do Not Support the Conclusion that the *Witherspoon* Doctrine Is Inapplicable to the Texas Bifurcated Procedure in Capital Cases.

After *Witherspoon v. Illinois*, 391 U.S. 510 (1968) was decided, the first Texas case to grapple with its application to Texas procedure was *Pittman v. State*, 434 S.W.2d 352 (Tex.Crim.App. 1968). In this notable opinion, presiding Judge Onion ably and exhaustively reviewed the relevant Texas history and practice with respect to veniremen with conscientious scruples against the death penalty. He concluded, "The impact of *Witherspoon* upon Texas in the selection of jurors in capital cases where the state is seeking the death penalty will not, while undoubtedly sharpening the traditional practice, so much affect that practice as it will the necessity for preserving for appellate review the manner of that selection." *Pittman v. State*, 434 S.W.2d at 357. In effect, Judge Onion held that *Witherspoon* would exert only minimal change in the ordinary Texas procedures. His reasoning follows.

At the time *Witherspoon* was decided, the prosecution could challenge a venireman for cause if he had "conscientious scruples in regard to the infliction of the punishment of death for crime, in a capital case, where

the State is seeking the death penalty." Tex. Code Crim. Proc. Ann. art. 35.16(b)(1) (Vernon). In truth, this basis of challenge for cause had been available to either side virtually from the earliest days of the Republic and before there was a comprehensive criminal code in Texas. *E.g.*, *White v. State*, 16 Tex. 206 (Tex. 1856); *Burrell v. State*, 18 Tex. 713 (Tex. 1857). Later the substantially identical rule was statutorily embodied within the comprehensive criminal codes including, for example, Tex. Ann. Code Crim. Proc. (1925) art. 616(11), which provided that a venireman could be challenged for cause if he "has conscientious scruples in regard to the infliction of the punishment of death for crime."

The most significant change in the 1965 Code revisions was that a challenge for conscientious scruples was made available only to the prosecution, not the defendant. Judge Morrison has explained, "It was the thought of the Committee that no accused could conceivably be injured by having to take such a juror and so such challenge by the accused was deleted from the revision." Morrison, "Interpretive Commentary," *following* Tex. Code Crim. Proc. Ann. art. 35.16 (Vernon).[5]

In spite of the language of the statute, which appears to authorize exclusion upon the basis and for the reasons condemned in *Witherspoon*, Judge Onion noted in *Pittman* that it had "long been the traditional practice in Texas, before and after the effective day of the 1965

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[5]It is also worth noting that a challenge for "bias or prejudice against any phase of law upon which the State is entitled to rely for conviction or punishment," Tex. Code Crim. Proc. Ann. art. 3516 (b)(3) (Vernon), or for "a bias or prejudice against any of the law applicable to the case upon which the defense is entitled to rely, either as a defense to some phase of the offense for which the defendant is being prosecuted or as a mitigation thereof or of the punishment therefor," art. 35.16(c)(2), is available to the prosecution and the defense equally.

Code, not to excuse a juror in capital cases who simply stated that he had conscientious scruples against the death penalty but to interrogate such a juror further to determine if this means he or she could never vote for the death penalty." *Pittman v. State*, 434 S.W.2d at 356. *See Stout*, "Examination of Prospective Jurors in Capital Cases," 29 Tex. L.Rev. 34 (1950). Several contributing factors to the Texas traditional practice were noted. Finally, the court correctly concluded, "Such practice squares with the requirements of *Witherspoon*." 434 S.W.2d at 356.

Thus, in *Grider v. State*, 468 S.W.2d 393 (Tex.Crim. App. 1971), the Court of Criminal Appeals reversed a conviction because prospective jurors were excused after expressing conscientious scruples against the death penalty, but without stating that they could never vote to consider its imposition. The court noted that such exclusion "does not square with *Witherspoon* or the traditional Texas practice," *Grider v. State*, 468 S.W.2d at 399. Indeed, in light of the Texas statute ultimately condemned in *Branch v. Texas*, the companion case to *Furman v. Georgia*, a capital defendant's need for this kind of protection is understandable.

After promulgation of the new Texas death penalty and punishment statutes, Tex. Penal Code Ann. art. 1257 (Vernon) (eff. June 14, 1973), and §§19.03 and 12.31(b) (Vernon) (eff. Jan. 1, 1974), *Hovila v. State*, 532 S.W.2d 293 (Tex.Crim.App. 1975), presented the Texas court with its first opportunity to consider the exclusion of conscientiously scrupled veniremen in alleged violation of the *Witherspoon* doctrine. Upon the dual basis of the traditional Texas practice and the *Witherspoon* doctrine, the conviction was overturned. The court rejected the state's argument that the new statutory scheme, especially the oath provided for under then art. 12.57(d) and now §12.31(b), rendered inapplicable the *Witherspoon* doctrine, reasoning as follows:

> To say that the jury's answers would not be affected by their attitude toward the death penalty as a punishment for crime simply because they will not bring forth the ultimate verdict would be to disregard the obvious. We will not engage in such tenuous reasoning.
>
> We hold, therefore, that the *Witherspoon* test remains the same.

Hovila v. State, 532 S.W.2d at 294.

Judge Odom in dissent provided the only explicit basis known to Respondent in Texas law for the logical argument set forth in Part I(A) above. Judge Odom noted that under the new statutory scheme "the jury neither imposes nor recommends imposition of the death penalty under the statute." To reverse the conviction in spite of each juror's oath that he could honestly and truly deliberate upon all issues of fact would be to "rel[y] upon a presumption of jury misconduct," 532 S.W.2d at 296.

The *Hovila* opinion was nevertheless not without basis. First, the traditional Texas practice as explained by the court in *Pittman v. State* was surely a point of reference militating in favor of reversal. Second, the court undoubtedly felt a compunction to apply *Witherspoon* as the law of the land that this Court had proclaimed it to be.[6] Third, the less than exhaustive voir dire examination in *Hovila* was probably inadequate under both *Witherspoon* and §12.31(b), making the conviction a difficult one to uphold under either authority.

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[6]As Mr. Chief Justice Burger has written, "The signals from this Court have not, however, always been easy to decipher." *Lockett v. Ohio*, 438 U.S. 586, 602 (1978).

Since *Hovila*, the Court of Criminal Appeals has on numerous occasions reaffirmed the applicability of *Witherspoon* to Texas procedure. For example, the court has several times stated that the *Witherspoon* doctrine is "still alive and well" in Texas. *E.g.*, *Woodkins v. State*, 542 S.W.2d 855, 862 (Tex.Crim.App. 1976), *cert. denied*, 436 U.S. 960 (1977); *Burns v. State*, 556 S.W.2d 270, 275 (Tex.Crim.App.), *cert. denied*, 434 U.S. 935 (1977); *Brock v. State*, 556 S.W.2d 309, 312 (Tex. Crim.App.), *cert. denied*, 434 U.S. 1002 (1977); and *Whitmore v. State*, 570 S.W.2d 889, 893 (Tex.Crim.App. 1976) (on original submission).

In these and many other cases, the Court of Criminal Appeals has consistently held that the *Witherspoon* doctrine applies to sentencing procedures in Texas capital cases. *E.g.*, *Moore v. State*, 542 S.W.2d 664, 672 (Tex. Crim.App. 1976), *cert. denied*, 431 U.S. 949 (1977); *Woodkins v. State*; *Burns v. State*; *Shippy v. State*, 556 S.W.2d 246, 251-52 (Tex.Crim.App.), *cert. denied*, 434 U.S. 935 (1977); *Brock v. State*; *Hughes v. State*, 562 S.W.2d 857, 859-61 (Tex.Crim.App.), *cert. denied*, 439 U.S. 903 (1978); *Hughes v. State*, 563 S.W.2d 581, 583 (Tex.Crim.App. 1978), *cert. denied*, 440 U.S. 950 (1979); *Chambers v. State*, 568 S.W.2d 313, 318-20 (Tex.Crim. App. 1978), *cert. denied*, 440 U.S. 928 (1979); *Bodde v. State*, 568 S.W.2d 344, 348-49 (Tex.Crim.App. 1978), *cert. denied*, 440 U.S. 968 (1979); *Garcia v. State*, 581 S.W.2d 168, 174-75 (Tex.Crim.App.), *petition for cert. filed* (U.S. Oct. 5, 1979) (No. 79-5464); and *Burks v. State*, 583 S.W.2d 389, 393-96 (Tex.Crim.App.), *petition for cert. filed* (U.S. Oct. 22, 1979) (No. 79-5533). *See also Smith v. State*, 540 S.W.2d 693, 697-98 (Tex.Crim.App. 1976), *cert. denied*, 430 U.S. 922 (1977); *Boulware v. State*, 542 S.W.2d 677, 683 (Tex.Crim.App. 1976), *cert. denied*, 430 U.S. 677 (1977); *Granviel v. State*, 552 S.W.2d 107, 123-24 (Tex.Crim.App. 1976), *cert. denied*, 431 U.S. 933 (1977); *Freeman v. State*, 556 S.W.2d 287, 297-98 (Tex.Crim.App. 1977), *cert. denied*, 434 U.S.

1088 (1978); and *Adams v. State*, 577 S.W.2d 717 (Tex. Crim.App. 1979) (A. 56).

The rule that may be distilled from these emanations of authority from the Court of Criminal Appeals is that *Witherspoon* and §12.31(b) co-exist as separate and independent bases of excluding jurors.[7] The former has been held applicable to Texas sentencing procedures as a result of the traditional Texas practice and, of course, as a result of that court's perceived duty to obey the law of the land as established in this Court's decisions. The latter has been properly justified for the reasons set forth below.

II. THE EXCLUSION OF PROSPECTIVE JURORS IN THIS CASE PURSUANT TO TEX. PENAL CODE ANN. §12.31(b) (VERNON) DID NOT VIOLATE THE DOCTRINE OF *WITHERSPOON V. ILLINOIS*, 391 U.S. 510 (1968).

From the foregoing discussion, one principle ineluctably emerges. Whatever may be said in favor of the moral value of the struggle, to directly apply the doctrine of *Witherspoon* and its progeny to the Texas sentencing procedures in capital cases upheld in *Jurek v. Texas*, 428 U.S. 262 (1976), is to employ a tool less than ideally suited for the task. That is, in light of the guided discretion fact questions that Texas sentencing juries are required to answer in capital cases, excusing prospective jurors upon the basis of their unalterable opposition to the death penalty and their inability to vote for a sentence of death in any case is a clumsy and at best inappropriate means of achieving the goal of a fair jury in a capital case.

[7]One respected Texas commentator has called the Court of Criminal Appeals' holdings in this regard "both fair and workable." Crump, "Capital Murder: The Issues in Texas," 14 Hous. L.Rev. 531, 545 (1977).

In fact, for reasons suggested above and more fully discussed below, Respondent ventures to suggest that *Witherspoon* is an inadequate means of safeguarding the defendant's rights in capital cases in Texas unless such a defendant is afforded the additional benefit of Tex. Penal Code Ann. §12.31(b) (Vernon). The essential reason is that some jurors might be disqualified or subject to exclusion for cause under *Witherspoon*, and yet be rehabilitated under §12.31(b) in that they would be capable of deliberating honestly in the Texas punishment process, their opposition to the death penalty notwithstanding. These jurors generally may well be ones favored by the defense.

Not surprisingly, the Texas Court of Criminal Appeals has been unable to glean any direct support from this Court's teachings for the proposition that the *Witherspoon* doctrine is inapplicable to Texas sentencing procedures in capital cases. Accordingly, that court in cases such as *Hovila v. State*, 532 S.W.2d 293 (tex.Crim.App. 1975), has conscientiously reversed death penalty convictions where it has perceived *Witherspoon* error. At the same time, the court has steadfastly held that regardless of whether a venireman is qualified under the *Witherspoon* doctrine, he is not qualified to sit on a Texas jury in a capital case if he cannot take the oath embodied in Tex. Penal Code Ann. §12.31(b) (Vernon). E.g., *Moore v. State*, 542 S.W.2d 664, 672 (Tex.Crim.App. 1976). *cert. denied*, 431 U.S. 949 (1977); *Brock v. State*, 556 S.W.2d 309, 311-13 (Tex.Crim.App.), *cert. denied*, 434 U.S. 1002 (1977); *Bodde v. State*, 568 S.W.2d 344, 348 (Tex. Crim.App. 1978), *cert. denied*, 440 U.S. 968 (1979): *Whitmore v. State*, 570 S.W.2d 889, 892-93 (1976) (on original submission); *Adams v.State*, 577 S.W.2d 717, 728 (Tex.Crim.App. 1979) (A. 56, 74), and cases there cited.

It is only by fundamentally misunderstanding the proper purposes of §12.31(b), as well as misstating the manner in which the statute was utilized in the instant case, that it may be concluded that the *Witherspoon* doctrine or any other known constitutional principle was violated by the selection procedures at Petitioner's trial. These procedures sought to achieve a fair and unbiased jury by eliminating veniremen who refused or were unable to assure the defense and the prosecution that they would be guided in their deliberations as required by Texas law and the Constitution. These prospective jurors were unable to swear that they could deliberate fairly and honestly at the punishment and in some cases the guilt or innocence stage of Petitioner's trial.

A. Section 12.31(b) Is Not the Broader Basis of Excluding Jurors Against the Death Penalty Condemned in *Witherspoon.*

The entire premise of Petitioner's position seems to be that Tex. Penal Code Ann. §12.31(b) (Vernon) is simply a method conjured up by the Texas Legislature, used by Texas prosecutors, and approved by Texas appellate courts for sweeping from the jury panels all prospective jurors opposed to capital punishment, but who nevertheless are technically qualified for jury service under the *Witherspoon* doctrine. Both historically and practically, nothing could be further from the truth.

1. The origins and specific purposes of the *Witherspoon* doctrine and §12.31(b) are different.

Witherspoon v. Illinois, 391 U.S. 510 (1968), *Boulden v. Holman*, 394 U.S. 478 (1969), and *Maxwell v. Bishop*, 398 U.S. 262 (1970), were all decided in an era of sentencing procedures in capital cases characterized by the type of unguided jury discretion at sentencing that

was upheld in *McGautha v. California*, 402 U.S. 183 (1971), as discussed more fully in part I(A) above. The juries in such cases were, of course, given wide latitude in deciding the fate of capital defendants. One may reasonably surmise that the jury debate about punishment in capital cases under such statutes must have been quite open-ended and far ranging indeed. Under the circumstances, it is understandable that the Court in *Witherspoon* concluded that the Constitution is offended by the systematic exclusion from the jury forum of all veniremen who were conscientiously opposed to the death penalty.

In *Witherspoon* itself, for example, the trial judge early in the voir dire examination proclaimed, "Let's get these conscientious objectors out of the way, without wasting any time on them." 391 U.S. at 514. Almost half the entire panel was then excluded for varying degrees of opposition to the death penalty. Concluding that a jury "[c]ulled of all who harbored doubts about the wisdom of capital punishment" constituted "a jury uncommonly willing to condemn a man to die," one "organized to convict," and "a hanging jury," 391 U.S. at 520, 521, 523, the Court held that the only veniremen whose opposition to the death penalty can cause them to be excluded are those who make it "unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case for them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*." (emphasis in original) 391 U.S. at 522 n.21.

Such veniremen, added the Court, cannot be "excluded on any broader basis than this . . ." *Id.* In *Boulden v. Holman*, 394 U.S. 478, 482 (1969), the Court reaffirmed that the prospective jurors' opposition to the death penalty must amount to a clear and unmistakable statement that they could never vote to impose it. And

in *Maxwell v. Bishop*, 398 U.S. 262, 264-66 (1970), the Court made it clear that equivocal responses cannot be a basis for exclusion.

By contrast, Tex. Penal Code Ann. §12.31(b) (Vernon) and its brief predecessor, Tex. Penal Code Ann. (1973), art. 1257 (Vernon), were not enacted until five years after *Witherspoon* was decided. In the wake of *Furman v. Georgia*, 408 U.S. 238 (1972), the Texas Legislature, like that of many other states, set about to enact a statutory means of imposing capital punishment that would not offend the Constitution. Like some other states, it elected to follow the advice of Chief Justice Burger's dissenting opinion in *Furman*, 408 U.S. at 375 *et seq.*, and enact a guided discretion statute.

Consequently, the capital murder statutes eventually enumerated as Tex. Penal Code Ann. §§19.02, 19.03 (Vernon), were promulgated, along with the fact questions at the punishment phase of the trial now included in Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon). At the same time and as part of that debate,[8] it was believed appropriate statutorily to require prospective jurors in death penalty cases to swear that they would not manipulate the fact-finding process at either the guilt-innocence or punishment stages of trial, but that all fact questions at either stage would be answered truthfully. Jurors who could not promise that they would be guided in their deliberations by the statutory guidelines rather than their own subjective standards or desires, were not qualified to serve.[9]

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[8]*See Comment*, "House Bill No. 200: The Legislative Attempt to Reinstate Capital Punishment in Texas," 11 Hous. L.Rev. 410, 416-20 (1974); Tex. S.Jour. 63rd Legis., 1441-54, 1535, 1539, 1632-33, 1641, 1648 (1973); Tex. H. R.Jour., 63rd Legis., 3217-18, 3221-22, 3227, 4975-82 (1973).

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[9]This Court's decision in *Davis v. Georgia*, 429 U.S. 122 (1979), settles little or nothing in controversy in this case. (*Cf.* Brief for Petitioner at 18-19.) In fully applying the *Witherspoon* doctrine to the Georgia statutory scheme for imposing capital punishment, the Court certainly did not intend to answer every argument that might ever be raised in defense of different procedures in other states. And the Georgia statutory scheme as set forth and discussed in *Gregg v. Georgia*, 428 U.S. 153, 162-68 & nn.3-11 (1976), differs from that of Texas in at least two important ways. First, the Texas sentencing jury's discretion is more closely guided than that of a Georgia jury, although a similarly wide range of aggravating and mitigating evidence is admissible at the punishment stage of the bifurcated trial. Second, the Texas jury neither votes for nor recommends any sentence, whether death or life imprisonment, but only answers fact questions with known automatic results. These distinctions help to explain the decreased relevance of *Witherspoon* to Texas sentencing procedures, as discussed at length elsewhere herein.

Thus, §12.31(b) was not a reaction to *Witherspoon* at all, but was the product of Texas efforts to enact a scheme for imposing the death penalty that this Court might approve. The Legislature knew that the era of standardless sentencing in capital cases was over. The new era of guided discretion in jury sentencing seemed to call for jurors who could agree to subjugate their own attitudes about the death penalty *to the extent* that they might deliberate in an unbiased manner the punishment criteria set forth in the statute. The judgment of the Texas Legislature seemed vindicated in *Jurek v. Texas*, 428 U.S. 262 (1976).

2. Section 12.31(b) is a neutral basis for excluding jurors insofar as attitude toward the death penalty is concerned, and it was neutrally applied in this case.

If the exclusion of a venireman under Tex. Penal Code Ann. §12.31(b) (Vernon), violates the *Witherspoon* doctrine, self-evidently it is necessarily because the statute is a "broader basis" of excluding veniremen who oppose the death penalty than that authorized in *Witherspoon*, 391 U.S. at 522 n. 21. Certainly that is the thrust of Petitioner's argument, as it must be. For Petitioner, that approximately half the veniremen he

alleges were wrongfully excluded for cause in fact *favored* the death penalty, as he concedes (Brief for Petitioner at 21-25), is simply an "absurd result" (*id.* at 25) that inexplicably "presents the most egregious violation of *Witherspoon*," (*id.* at 24). For Respondent, by contrast, this circumstance, in addition to those discussed below in connection with the conduct of the entire voir dire examination, is the linchpin of his argument that the application of the statute neither increases or decreases the willingness of a jury to condemn an accused to death, but only eliminates from that jury those persons unable or unwilling to allow their discretion to be guided in the manner prescribed by the Texas Legislature and upheld by this Court in *Jurek*.

The charts appended to the Brief for Respondent illustrate the disposition of each of the one-hundred seven veniremen examined at Petitioner's trial. Twelve, of course, were accepted for jury service. Twenty-six were excused peremptorily, eleven by the state and fifteen by the defense. Twelve veniremen were excused by agreement because of insufficient time to devote to the long trial, poor health, or both. Fourteen were excused, twelve without objection, for bias about the case or a prior opinion of the guilt or innocence of Petitioner. Eight veniremen were excused because of an inability to consider either the proper range of punishment or probation in a murder case; four of these were excused without objection. In addition, two were excused because they would have demanded proof of motive in a murder case; one was excused by agreement because of irrational reactions to everyone's questions; one because she would have required the accused to testify in his own behalf; and one for no apparent reason.

The remaining thirty veniremen are of interest for present purposes because they were excluded for some combination of *Witherspoon* or §12.31(b). Of these thirty,

Petitioner has chosen ten whose exclusion allegedly violates the Constitution; the voir dire examinations of these ten appear in the Appendix (A. 3-52). The twenty veniremen he has chosen not to challenge were excluded upon the basis of some combination of *Witherspoon* and §12.31(b), and it is quite clear that each was properly excludable for either reason; one was dismissed by agreement.

Of the ten complained of veniremen,[10] at least three showed themselves to be excludable under the *Witherspoon* doctrine. Ferguson (VD 616; A. 15) viewed the death penalty as an inappropriate statutory punishment and was unalterably opposed to the imposition of death regardless of the facts and circumstances. White

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[10]Texas law provides that the prosecution and defense shall each have fifteen peremptory challenges in capital cases. Tex. Code Crim. Proc. Ann. art. 35.15 (Vernon). In this case the prosecution used only eleven of its challenges (*see* the Chart appended hereto). If the Court decides that between one and four of the ten veniremen whose exclusion Petitioner challenges were indeed excluded in violation of the *Witherspoon* doctrine, then the issue of whether the presence of unused peremptory challenges rendered each exclusion harmless would be presented. This is the question upon which the Court has once granted certiorari, *see Moore v. Illinois*, 403 U.S. 953, 954 (1971), and never decided because the case was ultimately decided on different grounds, *see Moore v. Illinois*, 408 U.S. 786 (1972). It is the issue that the dissenters in *Davis v. Georgia*, 429 U.S. 122, 123-24 (1979) — Mr. Justice Rehnquist, joined by the Chief Justice and Mr. Justice Blackmun — thought worthy of attention.

The essential argument, of course, is that a defendant could not have been harmed by the wrongful exclusion of a venireman that the prosecutor would have struck by use of a peremptory challenge if his objection to the qualifications of the prospective juror had been overruled. At bottom, the argument is one founded upon harmless error. *Chapman v. California*, 386 U.S. 18 (1967). Indeed, if the Court agreed as a factual matter that the prosecutor would have exercised a peremptory challenge upon each of the one to four hypothetical veniremen who were wrongfully excluded in this case, then it indisputably appears that the death sentence should be saved.

(VD 1531; A. 26) and Andrews (VD 2697; A. 34) both expressed a belief that the death penalty might be an appropriate statutory punishment, but neither personally could vote to assess that punishment regardless of the evidence. All three of these veniremen were also unable to take the oath to follow the law pursuant to §12.31(b).

Three of the ten, including Ferguson, initially expressed general opposition to the death penalty as an appropriate statutory punishment: Ferguson, Williams (VD 2571 *et seq.*; A. 30 *et seq.*); and McDonald (VD 4496; A. 42). Of these three, only Ferguson could never vote for the death penalty.

Of the seven veniremen who were essentially in favor of the death penalty as an appropriate statutory punishment, four stated that they could not or believed they could not personally sit upon any jury that might inflict the death penalty: White, Andrews, Giuffrida (VD 4443; A. 38) and Riddle (VD 4928; A. 50), who was more equivocal than the others.

Three other veniremen, Mahon (VD 33; A. 3), Jenson (VD 351; A. 9) and Coyle (VD 1023; A. 19) expressed both belief in capital punishment and professed their ability to impose it personally, but were unable to swear as required by §12.31(b) that they would answer the fact questions at the punishment stage of the trial totally upon the basis of the evidence presented.

If there is any characteristic common to these ten jurors, it is not their feelings upon the death penalty, which ran the gamut from approval of capital punishment, through approval of capital punishment plus inability to vote for it personally, to some degree of opposition to capital punishment. It is not willingness or lack of willingness to vote for a sentence of death.

Instead, it is the inability to take the oath that their

answers to the fact questions would not be affected by their knowledge of the necessary consequences of their answers to those questions.

The trial judge and the prosecutor explained repeatedly and in great detail that the purpose of this statutory phrase is to assure that each venireman would speak the truth upon the fact questions presented at the punishment stage of the trial, and that none would answer dishonestly in order to achieve the desired result, *whether life imprisonment or death.* In fact, with respect to the examination of these veniremen, both the trial judge and the prosecutor seemed willing to accept any juror who could take the oath to answer truly the questions, even though such a juror might properly be excluded under the *Witherspoon* doctrine.

For example, when venireman Ferguson gave an answer that appeared to exclude him under *Witherspoon*, the prosecutor not only failed to object, but seemed to attempt to *rehabilitate* him under §21.31(b). (VD 616 *et seq.*; A. 16 *et seq.*). Precisely the same sequence of events occurred with venireman White, to whom the prosecutor did not object when she gave an answer that would have excluded her under *Witherspoon*. (VD 1531; A. 26). When venireman Andrews gave an answer that would have excluded her under *Witherspoon* and the prosecutor did object for that reason, the trial judge suggested that the prosecutor might want to inquire under §12.31(b). The prosecutor apparently withdrew his objection and did so.

In fact, if one looks elsewhere in the voir dire examination, it appears that §12.31(b) was as much used as a basis of *saving* prospective jurors who might otherwise have been disqualified under *Witherspoon* as it was a basis for excluding prospective jurors. To these jurors, like the ten the exclusion of which Petitioner complains, the trial judge and prosecutor carefully explained the Texas statutory scheme and the proper role

of a juror at the punishment phase of a capital trial. There were at least *eight veniremen*[11] who gave answers disqualifying them from jury service under the *Witherspoon* doctrine and, rather than being excluded for that reason, they were further examined in an apparent effort to save them for jury service under §12.31(b). That the prosecutor would have instigated and participated in this process as he did exhibits an extraordinary understanding of the Texas statutes and a sensitivity to the purposes of *Witherspoon*. One of these veniremen, Thomas, was actually saved for jury service because of the rehabilitating inquiries under the Texas statute, although she was later disqualified for her inability to consider a sentence as low as five years imprisonment for the offense of murder (VD 2656).

It seems apparent that §12.31(b) was not only not used as a broader basis of excluding jurors against the death penalty than that allowed in *Witherspoon*; the statute was not used as a means of excluding jurors opposed to the death penalty *at all.*[12] In fact, it appears that it was as much used as a means of rehabilitating jurors who might otherwise have been excluded under *Witherspoon*, but for the unique nature of the Texas sentencing procedures at the punishment phase of capital trials, as it was used for a basis of excluding anyone.

---

[11]The eight veniremen are Thomas (VD 2606-34); Andrews (VD 2692; A. 35); Heard (VD 3181-90); Crowe (VD 3685-91); Gadlin (VD 4411-12, 4415-17); Lewin (VD 4475-77); Coleman (VD 4906-12); and Smotherman (VD 4955-59).

[12]The contrast in this respect between the voir dire examination in Petitioner's case and that of *Burns v. Estelle*, 592 F.2d 1297 (5th Cir.) *reh. granted en banc*, 598 F.2d 1016 (5th Cir. 1979), is apparent.

This point illustrates a major flaw in Petitioner's argument that *Witherspoon* implements and Tex. Penal Code Ann. §12.31(b) destroys the capital defendant's right to "a jury drawn from a fair cross section of the community" as established in *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975), and other authorities such as *Duren v. Missouri*, 439 U.S. 357 (1979), *Peters v. Kiff*, 407 U.S. 493 (1972), and *Duncan v. Louisiana*, 391 U.S. 145 (1968). The statute properly applied, as it was in this case, simply does not exclude any identifiable segment of society within the meaning of the cases Petitioner has cited. It is entirely neutral with respect to age, race, sex, social class, attitude toward the death penalty, and any other criterion conceivably relevant to the trial of a capital case.

Instead, the statute operates to exclude persons who cannot swear to follow the law, allow their deliberations to be guided by the statutory criteria, to deliberate in an unbiased manner, and to answer all fact questions honestly. The statute for these reasons is not a means of diluting or distorting the conscience of the community, but a means of preserving it in capital trials insofar as it allows any person to serve on a Texas jury, provided *only* that in the end he is capable of answering fairly and honestly the questions that the Texas Legislature and this Court have held are the appropriate ones for resolution of a capital defendant's fate.

B. The Reasoning of *Lockett v. Ohio*, 438 U.S. 586 (1978), Strongly Supports the Application of §12.31(b) in this Case.

Examination of the relevant portion of the Court's holding (Part II-B) in *Lockett v. Ohio*, 438 U.S. 586, 595-7 (1978), both clarifies and strengthens Respondent's position herein. Ohio procedure in capital cases of course provided for a jury to decide the guilt or innocence of the accused, but provided for imposition of

penalty only by a panel of three judges if the offender had been tried before the trial judge, or by the trial judge if the accused had been found guilty by a jury. This Court upheld the exclusion of four veniremen for their negative answers to the following question posed by the trial judge:

> [D]o you feel that you could take an oath to well and truely [sic] try this case . . . and follow the law, or is your conviction so strong that you cannot take an oath, knowing that a possibility exists in regard to capital punishment?

438 U.S. at 595-96. The Court noted that nothing in *Witherspoon* or any other of its decisions requires a state to empanel jurors who cannot follow the law and make impartial decisions in resolving factual questions that determine guilt or innocence. Further, the Court said that *Taylor v. Louisiana*, 419 U.S. 522 (1975), which stands for the proposition that due process requires juries chosen from a fair cross-section of the community, is not violated by excluding veniremen "who have explicitly indicated an inability to follow the law and instructions of the trial judge," *Lockett v. Ohio*, 438 U.S. at 596-97.

The Texas death penalty statute, which has been specifically approved by this Court in *Jurek v. Texas*, embodies fact questions at the *punishment*, as well as the guilt or innocence, stage of trial. Although the questions are ones of fact in the sense that they admit of a specific affirmative or negative answer, a broad range of evidence, both aggravating and mitigating, is relevant to the answers to those questions. *Cf. Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

Nevertheless, the questions provide coherent, specific guidelines for the jury that otherwise would have the unbridled discretion condemned in *Furman v. Georgia*.

Both the State of Texas and capital defendants are entitled to jurors who will follow the law at the punishment stage of trial no less than Ohio was entitled to jurors who could follow the law at the guilt or innocence stage of trial in *Lockett v. Ohio*. Under *Lockett*, veniremen who cannot assure that they will deliberate fact questions at the guilt or innocence stage of trial in accordance with the law's dictates and based upon the evidence shown at trial, are properly disqualified from jury service. It seems a short step indeed to uphold the exclusion of veniremen who cannot take the same oath at the punishment stage of trial in a state providing jury sentencing guided by deliberations upon fact questions. Indeed, to conclude otherwise would be to condone and perhaps even to guarantee capital jurors who will insist upon exercising their discretion in the unguided and standardless manner condemned in *Furman v. Georgia*.

CONCLUSION

For these reasons, the State of Texas respectfully prays that the judgment of the Texas Court of Criminal Appeals be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

CHART

VOIR DIRE EXAMINATION

CHART, VOIR DIRE EXAMINATION

Accepted Jurors (12)	Jurors Excused for Insufficient Time or for Poor Health (All Without Objection) (12)
Mrs. Willie Millhollon (VD 94)	Gary D. Henley (VD 249)
Mrs. Douglas Fain (VD 372)	Betty Comstock (VD 332)
Paul Matlock (VD 1419)	James M. Benton (VD 787)
Grady R. Mankin (VD 1726)	Robert E. Garnier (VD 1826)
Lester L. Hutchings (VD 2225)	Morris Holman (VD 2484)
Anita Pritchett (VD 2927)	Mary B. Fox (VD 4629)
Senora S. Burgess (VD 3201)	Maxine Shannon (VD 4640)
Carl M. Skooglund, Jr., (VD 3953)	Odessa Turknett (VD 4644)
Diane M. Lucien (VD 4051)	George W. Martindale (poor health)(VD 4656)
Doris A. Hooper (VD 4325)	Robert L. Vandemark (VD 4659)
Giles F. Feazel (VD 5157)	Jerry A. Hitt (VD 5003)
Elliott Ramey (VD 5642)	Mrs. Mammie Bennett (poor health)(VD 5302)

CHART, VOIR DIRE EXAMINATION
(Continued)

Peremptory Challenges by the Defense (15)	Peremptory Challenges by the Prosecution (11)
Rose Barnett (VD 522)	John P. Bennett (VD 441)
Leslie W. Goekler (VD 708)	John T. Rogers (VD 816)
Jack W. Lacy (VD 884)	Ralph B. Carnes (VD 1866)
E.H. Davis (VD 1091)	Dwain L. Hendrix (VD 2167)
Raymond Wagner (VD 1207)	C.W. Mowchan (VD 2345)
Charles F. Abbott (VD 1586)	Helen Mize (VD 2737)
Leon C. Cunningham (VD 2005)	Rosemary Reece (VD 2851)
Marlin H. Miller (VD 3003)	Mrs. Nolan Kelso (VD 3367)
Mrs. D.W. James (VD 3317)	John C. Davis (VD 3714)
David N. Loupot (VD 3463)	Lavelle Henderson (VD 5051)
Eva L. Sledge (VD 3561)	Bonnie Roper (VD 5533)
Mrs. H.N. Monroe (VD 3788)	
Marvin V. Elliott (VD 4571)	
Mrs. Marilyn Edwards (VD 4790)	
Betty Wakefield (VD 5397)	

C-2

CHART, VOIR DIRE EXAMINATION
(Continued)

Jurors Excluded upon Basis of Witherspoon and/or §12.31(b) (20)	Excluded Jurors Complained of in These Proceedings (10)
Agreed or No Objection	Mrs. Forest Mahon (VD 33)
Albert F. Mallouf (VD 5304)	Forrest J. Jenson (VD 348)
	George C. Ferguson (VD 613)
Objections	Nelda Coyle (VD 1017)
Vivian B. Hill (VD 234)	Mrs. Lloyd White (VD 1525)
Virginia M. Brown (VD 778)	Curtis Williams (VD 2571)
Myrtle H. Hones (VD 860)	Bobbie Andrews (VD 2692)
David Gray (VD 910)	Anthony Giuffrida (VD 4443)
Helen Roper (VD 935)	Penny L. McDonald (VD 4492)
Susan Weber (VD 1072)	Dorothy G. Riddle (VD 4920)
Beny L. Vergati (VD 1567)	
Leon P. Bomar, III (VD 1846)	
Walter Heard (VD 3167)	
A.M. Crowe (VD 3679)	
Forest E. Gadlin (VD 4403)	
Vallie M. York (VD 4428)	
Leslie J. Lewin (VD 4469)	
Cyril F. Vincent (VD 4661)	
Dorothy Bragg (VD 4714)	
Davenia C. Coleman (VD 4899)	
Gerry E. Smotherman (VD 4948)	
Barbara A. Dickson (VD 5124)	
Mrs. Bobby L. Rodgers (VD 5607)	

C-3

CHART, VOIR DIRE EXAMINATION
(Continued)

Jurors Excused for Bias or Prior Opinion of Defendant's Guilt or Innocence (14)

Agreed or No Objection

Mrs. Bob Johnson (VD 71)
Faye Morriss (VD 272)
Constance J. Preston (VD 796)
Julanna Longorio (VD 948)
Jeanette M. Hester (VD 1686)
Jeffery Gardner (VD 2571)
B.R. Mathis (VD 3555)
Betsy J. Fustejousky (VD 3707)
Fellene Mack (VD 4464)
Robert R. Fegraeus (VD 4637)
Patricia A. Mikus (VD 5097)
William C. Adams (VD 5276)

Objections

Yvonne B. Lowerre (VD 2437)
Bob L. Bailey (VD 3881)

CHART, VOIR DIRE EXAMINATION
(Continued)

Jurors Excused for Inability to Consider Range of Punishment or Probation (8)

Agreed or No Objection

Eleanore Porter (VD 632)
Laura S. Gummelt (VD 2092)
Peggy Stines (VD 3133)
Oleta M.McDowell (VD 4232)

Objections

Ben H. Kelly (VD 1362)
Christine Thomas (VD 2606)
Mrs. Pat Pinzel (VD 4163)
Bobby J. Berry (VD 4848)

Miscellaneous Exclusions (5)

Mildred Talley
(would demand proof of motive; objection)(VD 958)

Cleotha Pellum
(irrational responses; no objection)
(VD 2677)

Charles H. White
(would demand proof of motive; objection)
(VD 4683)

Ms. Ronald E. Roland
(would require defendant to testify; no objection)
(VD 4734)

Marion B. Jett
(no reason; no objection)
(VD 5363)

Will not be printed

FOR ARGUMENT

Supreme Court, U.S.
FILED
MAR 19 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-5175

RANDALL DALE ADAMS,

Petitioner

v.

THE STATE OF TEXAS,

Respondent

ON WRIT OF CERTIORARI TO THE
TEXAS COURT OF CRIMINAL APPEALS

PETITIONER'S REPLY BRIEF

MELVYN CARSON BRUDER
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ON WRIT OF CERTIORARI TO THE
TEXAS COURT OF CRIMINAL APPEALS

PETITIONER'S REPLY BRIEF

Pursuant to Rule 41(3) of the Rule of this Court, the petitioner files this his reply brief.

I.

Respondent argues that "both the trial judge and the prosecutor seemed willing to accept any juror who could take the [section 12.31(b)] oath to answer truly the questions, even though such a juror might properly be excluded under the Witherspoon doctrine." Brief for Respondent, 57. This, in respondent's view, section 12.31(b) is "a means of rehabilitating jurors who might otherwise have been excluded under Witherspoon . . . " Id. at 58.

This argument is patently false, both as a matter of Texas law and as a matter of fact based upon analysis of the record in this case.

A.

The Texas Court of Criminal Appeals has repeatedly held that venire members who meet the Witherspoon test for exclusion for cause may be dismissed from jury service without any inquiry under §12.31(b). In Brock v. State, 556 S.W.2d 309, 313 (Tex.Crim.App. 1977), that court held:

> . . . where prospective jurors are properly disqualified under the Witherspoon rule, the fact they may or may not have been disqualified or even questioned under V.T.C.A., Penal Code, §12.31(b), is of no consequence. Battie v. State, 551 S.W.2d 401 (Tex.Crim.App. 1977); Whitmore v. State, [570 S.W.2d 889 (Tex.Crim.App. 1976)]; Smith v. State, 540 S.W.2d 693, 698 (Tex.Crim.App. 1976). Cf. Moore v. State, 542 S.W.2d 664, 672 (Tex.Crim.App. 1976). A prospective juror may be disqualified under either said §12.31(b) or Witherspoon or both.

Again, in Franklin v. State, Tex.Crim.App., No. 57348, May 24, 1978, slip op. at 17, rehearing granted and judgment reversed on other grounds, 588 S.W.2d 920 (Tex.Crim.App. 1979), the court stated:

> In a capital murder case, a prospective juror may be disqualified under Witherspoon, Sec. 12.31(b), or both. Brock v. State, 556 S.W.2d 309 (Tex.Cr.App. 1977). If a prospective juror is disqualified under Witherspoon, the fact that he may or may not have been disqualified or even questioned under Sec. 12.31(b), supra, is of no consequence. Brock v. State, supra.

And again, in Bodde v. State, 568 S.W.2d 344, 348 (Tex.Crim.App. 1978):

> In a capital murder case, a prospective juror may be disqualified under either Witherspoon or Sec. 12.31(b) or both. Franklin v. State, supra; Brock v. State, supra; Moore v. State, supra. A prospective juror who is disqualified under Witherspoon need not be disqualified or even questioned under Sec. 12.31(b). Franklin v. State, supra; Brock v. State, supra.

Only last spring the court reiterated this well-established principle of Texas law in Burks v. State, 583 S.W.2d 389, 393 - 394 (Tex.Crim.App. 1979):

> In a capital murder case, a prospective juror may be disqualified under either Witherspoon or Section 12.31(b), or both. Bodde v. State, 568 S.W.2d 344 (Tex.Cr.App. 1978); Brock v. State, 556 S.W.2d 309 (Tex.Cr.App. 1977); Moore v. State, 542 S.W.2d 664 (Tex.Cr.App. 1976). A prospective juror who is disqualified under Witherspoon need not be disqualified or even questioned under Section 12.31(b) . . .

Thus, respondent's novel construction of §12.31(b) has no basis in Texas law. Indeed, it is directly contrary to the explicit holdings of the Texas Court of Criminal Appeals. Respondent's 11th-hour effort to save the statute on this basis must fail.

B.

Respondent's repeated assertion that §12.31(b) somehow helps the defendant, rather than operating as an impermissible broader basis for excusion than is permitted by Witherspoon, is highly disingenuous. By definition, a broader basis for exclusion is present when venire members who could not have been excluded under Witherspoon are nonetheless excluded under §12.31(b). Respondent's own analysis of the record so much as admits that in this case venire members Williams, McDonald, Mahon, Jenson and Coyle could not have been excluded under Witherspoon. Brief for Respondent 56. Thus, they were not in need of any "rehabilitation" pursuant to §12.31(b). The statute was used to exclude them -- not to rehabilitate them. Section 12.31(b), by disqualifying them merely because they would be "affected" by the possible imposition of the death penalty, therefore served as the very sort of broader basis for exclusion that Witherspoon explicitly forbids.

II.

Respondent's brief repeatedly ignores the actual text of §12.31(b), which requires exclusion for cause merely if a prospective juror is unable to swear that he or she will not be "affected" in factual deliberations by the prospect of the death penalty. The statute does not require that such affectation amount to a disposition to answer the three punishment questions "untruthfully", "dishonestly", "unfairly" or in a "biased" manner. [1] But

[1] The Court of Criminal Appeals has pointedly rejected efforts to construe (continued)

nearly every description of the statute by respondent employs the above sort of terms rather than the word actually used in the statute: "affected".[2]

This case must be decided on the basis of §12.31(b) itself, not upon some different statute conjured up by the State in the hope that alternative language might pass constitutional muster. Under §12.31(b), prospective jurors may be excused for cause solely because they cannot swear that they will not be "affected" by the prospect of the death penalty. That is all the statute requires -- nothing more; and that is all the statute permits.[3] Because that basis for exclusion clearly is in conflict with Witherspoon, the statute cannot stand.

Conclusion

For the reasons stated herein and in the Brief for Petitioner, previously filed herein, the sentence of death imposed upon the petitioner should be reversed and the cause should be remanded for further proceedings.

Respectfully submitted,

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(footnote continued from preceding page)

the word "affected", as used in §12.31(b), in such a limited fashion. In O'Bryan v. State, 591 S.W.2d 464, 471 (Tex.Crim.App. 1979), the court said that "[t]he fact that [a prospective juror] stated that he could truthfully answer the special issues submitted at the punishment hearing pursuant to Article 37.071" was unavailing to a claim that such juror was improperly excused under Witherspoon. And in Hovila v. State, 562 S.W.2d 243, 247 (Tex.Crim.App. 1978), the court said: "Section 12.31(b) does not disqualify prospective jurors on the basis of whether or not they can state under oath they will answer the fact questions truthfully. This provision disqualifies those jurors who cannot state under oath that the mandatory penalty of death

(continued)

(footnote continued from preceding page)

or life imprisonment would not affect their deliberations on any issue of fact."

Whether a prospective juror swears he will answer the three punishment questions "truthfully", "honestly", "fairly" or in an "unbiased" manner is totally irrelevant to the issue of whether the juror is subject to exclusion under §12.31(b).

[2] See, e.g., Brief for Respondent, 34: " . . . the oath requires him in effect to swear that he will not lie at either stage of trial and dishonestly answer fact questions . . . "

[3] See n. 1, supra. The holdings in O'Bryan and Hovila, cited in n. 1, completely undermine the respondent's reliance upon Lockett v. Ohio, 438 U.S. 586 (1978). See Brief for the Respondent 59 - 61.

CERTIFICATE OF SERVICE

I, Melvyn Carson Bruder, counsel for the petitioner and a member of the Bar of this Court, hereby certify that I have served one copy of the foregoing Petitioner's Reply Brief upon counsel for the respondent, Doug Becker, by forwarding the same to him in care of the Clerk of this Court along with the copies of the foregoing Petitioner's Reply Brief forwarded to the Clerk of this Court for filing, by prior agreement with Mr. Becker.

_____

MELVYN CARSON BRUDER

Supreme Court, U.S.
FILED
JAN 24 1980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5175

RANDALL DALE ADAMS,

Petitioner,

—v.—

STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-5175

==========

RANDALL DALE ADAMS,

Petitioner,

-v.-

STATE OF TEXAS,

Respondent.

==========

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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Statement of Interest of Amicus Curiae NAACP Legal Defense and Educational Fund, Inc.

(1) The Legal Defense Fund is a non-profit corporation established to assist black citizens in securing their constitutional rights. In 1967, it undertook to represent all condemned prisoners

in the United States, regardless of race, for whom adequate representation could not otherwise be found. It has frequently represented condemned inmates before this Court. E.g., Maxwell v. Bishop, 398 U.S. 262 (1970); Furman v. Georgia, 408 U.S. 238 (1972); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Stanislaus Roberts v. Louisiana, 428 U.S. 325 (1976); Davis v. Georgia, 429 U.S. 122 (1976); Gardner v. Florida, 430 U.S. 349 (1977); Coker v. Georgia, 433 U.S. 584 (1977); and Lockett v. Ohio, 438 U.S. 586 (1978). The Fund has also appeared before this Court as amicus curiae in many other capital cases. E.g., Witherspoon v. Illinois, 391 U.S. 510 (1968); Gregg v. Georgia, 428 U.S. 153 (1976); and Proffitt v. Florida, 428 U.S. 242 (1976).

(2) The Legal Defense Fund continues to provide legal assistance to indigent condemned prisoners of all races, and is now involved as counsel in over one hundred death cases in various states. It represents a substantial number of indigent death-sentenced inmates in Texas who are at various stages of post-conviction proceedings. Additionally, the Fund provides consultative

assistance to attorneys representing a large number of other capital defendants in Texas and elsewhere.

(3) The issues presented by this case are of general applicability to a number of death-sentenced inmates in Texas, including several represented by the Legal Defense Fund. The identical issues have been decided in favor of another Texas capital defendant by a panel of the United States Court of Appeals for the Fifth Circuit, in a case in which the Fund appeared and co-argued as amicus curiae. Burns v. Estelle, 592 F.2d 1297 (5th Cir. 1979), rehearing en banc granted, 598 F.2d 1016 (5th Cir. 1979) (argued January 8, 1980). Because of the Fund's experience with these particular constitutional questions, we respectfully request the opportunity to present our views in the hope that they may be of assistance to the Court.

(4) Consent has been granted by both petitioner and respondent for the filing of this amicus curiae brief.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals is reported at 577 S.W.2d 717 (Tex. Crim. App. 1979).

JURISDICTION

Jurisdiction of this Court rests upon 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

Petitioner's conviction and death sentence were affirmed by the Texas Court of Criminal Appeals on January 31, 1979, and rehearing was denied on March 21, 1979. A timely petition for writ of certiorari was filed, and on December 10, 1979, this Court granted certiorari. ___ U.S. ___, 48 U.S.L.W. 3387.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, and the following statutes of the State of Texas:

Tex. Penal Code §12.31. Capital Felony.

(a) An individual adjudged guilty of a capital felony shall be punished by confinement in the Texas Department of Corrections for life or by death.

(b) Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

Tex. Code Crim. Pro. Art. 37.071. Procedure in capital case.

(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court

of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

QUESTIONS PRESENTED

(1) Whether the doctrine of Witherspoon v. Illinois, 391 U.S. 510 (1968), is applicable to the bifurcated procedure employed by Texas in capital cases.

(2) If so, whether the exclusion from jury service in the present case of prospective jurors pursuant to Texas Penal Code §12.31(b) violated the doctrine of Witherspoon v. Illinois, supra.

STATEMENT OF THE CASE

On May 3, 1977, petitioner was convicted of capital murder and sentenced to die by a jury in Criminal District Court No. 2 of Dallas County, Texas. The Texas Court of Criminal Appeals affirmed the conviction and death sentence on January 31, 1979 (577 S.W.2d 717), and rehearing was denied on March 21, 1979. On December 10, 1979, this Court granted certiorari, ___ U.S. ___, 48 U.S.L.W. 3387.

This case concerns the constitutionality of the exclusion for cause of prospective jurors at petitioner's trial. A description of the voir dire examination of several of these prospective jurors is set forth below.

MRS. FRANCIS MAHON

Mrs. Mahon believed in capital punishment:

> ... there's always been a need for the death penalty in certain types of cases.
>
> Q. [By the prosecutor]: Have you always been in favor of it?
>
> A. Yes.

T. 34.[1/] She further repeatedly vowed that she was in favor of the death penalty in a proper case, including this type of case (as it was described to her by the prosecutor), T. 33, 34, 35, 36, 37, 49, and would answer "yes" to the three special questions determinative of sentence if the State proved beyond a reasonable doubt that the answers to those questions were indeed "yes," T. 60-64. However, when asked whether she could swear that the mandatory sentence of death or life imprisonment would not affect her deliberations [Tex. Penal Code §12.31(b)], she responded:

1/ Numbers preceded by "T." refer to pages of the transcript of the jury selection in this case.

> ... I just don't know. I really do not know whether it would effect me or not when it came right down to it....
>
> -- it could effect me and I really cannot say no, it will not effect me, I'm sorry. I cannot, no.

T. 67-68.

> ... If there was any doubt in my mind about one of those three questions that were asked, then I might have a tendency to say no to one of them if there was a doubt in my mind there. You see what I'm saying?
>
> THE COURT: What you're saying, you cannot give us your assurance that you would not be influenced by the punishment in answering the questions on fact issues.
>
> JUROR MAHON: Well, I'm saying I could be influenced and I think most anyone could be.

T. 70. The court excused Mrs. Mahon for cause.

T. 71.

MR. FORREST JENSON

Mr. Jenson stated his views on capital punishment as follows:

> Well, I think I believe in letting the punishment fit the crime. I've never had to decide whether or not somebody lived or died and I don't know if I could or not. I feel like I could if I had to....

> ... I wouldn't say I'm really for the death penalty, but I do feel that society has to have some deterrent to crime and as a result, probably capital punishment is the only means of deterrent that we have.

T. 351. Mr. Jenson further affirmed that he was capable of personally voting for the death penalty as a juror, T. 354, and of answering "yes" to the three Texas special questions if the evidence called for those answers, T. 361-64.

However, when asked whether he could take the §12.31(b) oath, Mr. Jenson stated:

> Well, I think it probably would [affect my deliberations] because afterall, you're talking about a man's life here. You definitely don't want to take it lightly.... [W]hen you have got the death penalty to deal with, I think you have got to be pretty certain.

T. 367.

> Well, I'm just human like everybody else ... I think it probably will effect anybody's ...
>
> I don't know of anybody it couldn't [affect]...
>
> ... I don't believe anybody could [not be affected] because you might as well get a computer to sit on the jury.

T. 368-70. Mr. Jenson was excused for cause. T. 371.[2/]

MRS. NELDA COYLE

Mrs. Coyle favored the death penalty in some circumstances, and would vote for the death penalty in the present type of case if the facts and circumstances called for it. T. 1023-26.

When asked whether the death penalty would "affect" her deliberations [Tex. Penal Code §12.31(b)], Mrs. Coyle at first stated that it would, T. 1030, 1035, and then said that she wasn't sure whether or not it would affect her because she had never before been a juror in a death case, T. 1038, 1048-54. She agreed that she could not assure the Court that she would not be affected. T. 1054-55. Upon questioning by defense counsel, she said that she could decide the issues of fact in the case without worrying about the death penalty or life imprisonment. T. 1059. Upon further questioning by the prosecutor,

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2/ Respondent's Brief in Opposition to Certiorari (p. 6) notes that Mr. Jenson used the phrase "beyond all reasonable doubt" in some of his answers. See T. 351, 354, 368. However, the prosecutor did not press Mr. Jenson as to his meaning in using this phrase and the trial judge did not rely upon it in excusing him for cause.

she said that "[y]'all have got me confused," T. 1060,[3/] and ultimately reverted to her earlier position that she could not say whether or not she would be affected, T. 1064-65, 1067. "I cannot tell you this because I don't know." T. 1067. She was excused for cause, the trial judge commenting that "[w]e are simply in a situation where you are not able to give the assurance that the law requires in order to serve on the jury." T. 1070.

MRS. LLOYD WHITE

Mrs. White first stated that she did not believe in capital punishment, T. 1528, and then said that "I think I believe in capital punishment but I don't want to have anything to do with it, is that clear?" T. 1530. At one point she agreed that she "could never sit in a case which would call upon [her] to make decisions that could lead to a man's death," T. 1531, and that she did

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3/ Mrs. Coyle stated at this point that she did not want to be a juror. T. 1060. When pressed by the prosecutor as to whether her reluctance to serve was based upon her feelings about the death penalty, she responded: "Well, part of it but there is a lot of other reasons." T. 1061.

not think she would ever be able to vote "yes" to the three sentencing questions, T. 1544. She also stated that the prospect of the death penalty would affect her sentencing deliberations. T. 1535, 1545.

Upon questioning by defense counsel, however, Mrs. White stated three times that she could set aside her feelings and vote for the death penalty. T. 1547. She was then asked:

> ... you have to vote the question -- the answers to the questions honestly irregardless of what you think the penalty should be, do you think you can do that?
>
> A. Yes.
>
> Q. If the facts and circumstances justified it?
>
> A. Yes.
>
> Q. A yes or no answer -- you would answer yes or no irrespective of how you would -- you would set aside your feelings about how you thought the punishment should come out?
>
> A. I think so.

T. 1548. Defense counsel then began discussing the elements of the offense, T. 1549-50, but was admonished by the trial judge:

> Well, she's been submitted under 1231. Stay with 1231 if you would.

T. 1551. Defense counsel objected that Mrs. White's answers had established that she was qualified to serve. Ibid.

Upon further questioning by the prosecutor, Mrs. White stated that "I don't believe I can serve on this jury" because "this is all just going over me." T. 1555. The trial judge then attempted to clarify her views, and the following colloquy ensued.

> [THE COURT] ... You have to be able to objectively answer those questions based on the evidence that you hear during the trial without any regard whatsoever to what punishment would follow.
>
> Do you follow me?
>
> JUROR WHITE: Yes.
>
> MS. JAMES [Defense Counsel]: Your Honor, I again object to this question, it's been asked and answered on the first go-around. I think they finally did answer the first time they went around. She did not think her fact deliberations would be unequivocally [affected] --
>
> JUROR WHITE: Well, I don't think -- I think that was wrong.
>
> THE COURT: Your objection is overruled.
>
> JUROR WHITE: I think I answered wrong. I think I have got to go back the other way now.

> THE COURT: Well, that is what we are trying to find out.
>
> JUROR WHITE: Now, am I making myself clear now?
>
> THE COURT: Well, the reason I go into it is because I think that you originally answered it one way and then answered it a different way, is that right?
>
> JUROR WHITE: I think that is what I did, yes.

T. 1558-59.

Upon further questioning, Mrs. White stated twice more that she could not give her assurance that her deliberations would not be affected. T. 1561, 1563.

> Q. [By defense counsel]: I'm sorry we have to go over it again but I understood you to say when we asked you at the beginning could you lay your opinion and your feelings aside and answer the questions honestly, I think you said yes?
>
> A. I did but I cannot say yes to that now. That is not -- I couldn't lay my feelings aside.

T. 1563. Mrs. White was excused for cause. T. 1566.

MR. CURTIS WILLIAMS

Mr. Williams did not know how he felt about the death penalty. T. 2576. At first he stated that he did not know whether he could vote to impose death, because he wasn't sure of his feelings. T. 2577-79. He stated:

I don't know. I don't -- I guess I could.

THE COURT: You're not sure?

THE WITNESS: Right.

T. 2580.

I'm not saying I would never, never do it. I'm not sure right now. I don't know.

Q. [By the prosecutor]: You're not sure whether you could ever, ever do it?

A. I don't know.

T. 2582.

Upon further questioning by the prosecutor, Mr. Williams at times stated "I just couldn't," T. 2586, and "I can't do it," T. 2592; at other times he stated that "I don't think I could," T. 2587, 2592, 2595; and at other times he repeated that he just didn't know, T. 2586, 2588, 2589, 2590.

However, after the trial judge explained to him the Texas procedure for determining sentence in a capital case, Mr. Williams stated: "I could answer the questions." T. 2597. The following colloquy then ensued:

THE COURT: All right, sir. Would you and could you answer all three of those questions yes if the evidence says, to your way of thinking, that the questions ought to be answered yes?

THE WITNESS: That's right.

THE COURT: Even though you realize if you did answer yes that the death penalty is going to come out of that, could you still answer those questions yes? That's what I'm getting at. If you can, you can; if you cannot, you cannot. We just need to know how you feel.

THE WITNESS: I guess I could answer all three questions yes.

THE COURT: Say you're back in the jury room and found him guilty in capital murder, you're voting on these questions with the other Jurors; and let's say under the evidence you heard that the right answer to all three of those questions is yes, okay?

THE WITNESS: Right.

THE COURT: You know that if you vote yes on all three questions that his punishment is going to be death; and my question is, under those circumstances would you go ahead and vote yes or would you be influenced by the death penalty part to keep you from voting yes?

THE WITNESS: I think I would be influenced by the death penalty.

THE COURT: Do you think the punishment of death would affect your deliberations?

THE WITNESS: Yes.

THE COURT: (To Mr. Scott [the prosecutor]) Do you submit [i.e., challenge for cause]?

MR. SCOTT: I submit.

T. 2597-98.

After inquiry by defense counsel, the Court ascertained Mr. Williams' position once again:

> He says (to the witness) -- and you can correct me if I am wrong -- Mr. Williams stated that even though the questions should be answered yes, that the punishment of death, that would affect his ability to answer the questions yes and would affect his deliberations on fact issues.
>
> (To the witness): Is that a fair statement?
>
> THE WITNESS: Yes.

T. 2598-99.

Defense counsel then further questioned Mr. Williams:

> Would there be an automatic "no" response or would you be able to answer "yes"?
>
> A. (By the Witness) Yes, I think I could answer all the questions yes.
>
> Q. You said yes, you thought you could answer them? You would not have an automatic no response?
>
> A. I'm not going to say I'm going to have an automatic response.

T. 2601-02. Defense counsel then objected to Mr. Williams' exclusion, and the Court asked the prosecutor:

> Are the grounds for submission that he doesn't comply with 1231?
>
> MR. SCOTT: That's correct.

T. 2602. The Court once again asked Mr. Williams the question posed by Tex. Penal Code §12.31(b):

> Let me ask you again, in your deliberations on the issues of fact, in other words, those three questions we've talked about, would you be affected in your deliberations by the punishment of death or life imprisonment?
>
> THE WITNESS: That's right.

T. 2602-03.

Mr. Williams was excused for cause. T. 2604.

MRS. BOBBIE ANDREWS

Mrs. Andrews felt that she believed in the death penalty, T. 2697, but nonetheless stated at first that she personally was incapable of imposing it, T. 2697-98. However, she subsequently stated that

> ... if I were in the situation I would consider the facts as presented, and I agree that there are some acts that deserve the death penalty. If a person takes another person's life, I don't think he or she should be given an opportunity to do it again.

T. 2699. When reminded that she had said that she personally could not vote for the death penalty, she replied:

> That's what I said, and I think that's how I feel. I've never served on a Jury before, been a part of a group that says this. It would be a little bit different rather than being an individual.

T. 2700.

The trial judge then turned to the question posed by the §12.31(b) oath, asking Mrs. Andrews whether she could give her "unequivocal assurance" that the punishment of life or death would not affect her deliberations. She replied that "I don't believe I could give you my unequivocal assurance." T. 2704. When asked again whether the potential penalty would affect her deliberations, she paused and then stated: "I have to say it would." T. 2705-06.

Upon subsequent questioning by defense counsel, Mrs. Andrews stated that she "certainly could consider" the death penalty although she felt that "my feelings might enter into it. I do not believe in taking someone else's life." T. 2708. When asked whether she could set her feelings aside and allow the State's right to impose the death penalty to prevail, she at first answered "I will have to say no to that" but then said "I don't know." T. 2709-10. She further stated that

> ... I believe a person who has done any one of these things should be punished. And I have no disagreement with the State's punishment for this.

> All I said was I personally would rather not be a part of saying, this person's life should be taken.

T. 2713. And when asked again whether she could set aside her feelings and vote for the death penalty, she answered:

> Well, I'm not sure that's a question I could answer today. I mean, I think I would have to be in that situation and I would have to hear all the facts and then I would know what I would do.

T. 2715.

When defense counsel argued that Mrs. Andrews had in effect answered "I don't know" on the subject of whether she could set aside her personal feelings and follow the Legislature's range of punishment, T. 2718, the trial judge interrupted and stated:

> That's not the point ...
>
> ... she has never stated that she would not be affected in factual deliberations because of the mandatory punishment of life or death. That's the issue we're on ...
>
> She's been submitted on Article 1231. That's the issue at hand.

T. 2718.

Defense counsel nonetheless returned to the earlier line of questioning, and again asked Mrs. Andrews if she would automatically vote against the death penalty. She replied:

> I just said that I was afraid I could not lay aside my feelings. I don't know that I would automatically vote against it.

T. 2719. Although she was not sure that her feelings "would not affect" her decisions, T. 2720, 2721, she stated that she "would answer the questions honestly," T. 2723, and that "[t]here might be a case where I could vote yes" on the three questions determinative of sentence, T. 2725.

The trial judge asked Mrs. Andrews whether she could assure him that she would not be affected in her deliberations, and she replied: "That's what I said I could not assure you of." T. 2726. She then had the following exchange with the judge:

> ... I would not want to be dishonest in the way I answered the questions. But my personal feeling is I don't want to be a part of taking someone's life.
>
> Now, is that -- you know, are those two answers not compatible?
>
> THE COURT: I don't want to comment on that, because in the end I have to come back to the statutory question. We can not impanel, under the law, anyone -- anybody on this Jury unless and until that Juror can swear under oath that the mandatory punishment of death or life imprisonment will not affect their deliberations on any fact issue in this case.

> THE WITNESS: Okay. I cannot do that.
>
> THE COURT: You cannot swear to that?
>
> THE WITNESS: Right.

T. 2726-27. She was excused for cause. T. 2730.

MS. PENNY L. McDONALD

Ms. McDonald was against capital punishment. T. 4496. At first she said that she could not vote for the death penalty in this type of case, T. 4497, but upon further questioning by the prosecutor said that she could do so, T. 4497-98, and that "I think I would have to know more of the circumstances [of the case]," T. 4499. She ultimately stated:

> ... I can't say I'm flat against capital punishment until I have heard the facts of the case.
>
> THE COURT: I'm sorry. When you say you're against capital punishment, are you saying that you're against it period, or are you against it in most cases or I don't quite understand what you're saying.
>
> MS. McDONALD: I'm against it as far as ever being personally concerned with it. Reading the paper or reading anything -- I'm against it as far as that goes.
>
> THE COURT: Well, are you saying that even though you're against it, since it is a law, that you could serve on a jury and vote for it if the facts were proper?
>
> MS. McDONALD: Yes, I could.

Q. (By Mr. Scott [the prosecutor]) I understand your position now. It's a matter of the facts and circumstances and if the proper facts came along to your way of thinking, you could vote for death?

A. Yes, I could.

T. 4506.

The prosecutor's questioning later turned to the §12.31(b) oath:

Q. (By Mr. Scott) Would your feelings affect the way that you deliberated the issues of fact in the case?

A. Yes, I think anyone's feelings would.

Q. I'm not arguing with that. Would the mandatory sentence of death or life affect your deliberation on the issue of guilt or innocence?

A. Not the guilt or innocence. If the man is guilty, he's guilty, and the next step is the next step.

Q. You say it would on the three questions?

A. Might. I don't know. Like I said before, I would have to hear all of the circumstances and all of the facts. I think anyone who sat back there, even [if] they told you emphatically -- would inject their own feelings.

T. 4529-30.

Subsequently, Ms. McDonald said at one point that she would not be affected in her sentencing deliberations. T. 4536. And upon further questioning by the prosecutor, she stated:

I wouldn't answer the three questions yes unless I felt he deserved death from the facts, and I can't consider the facts until I have heard them, and then I might change my mind. I can't say what I would do until I know the facts.

Q. Would you, if you thought the facts meant the questions should be answered yes, and yet your feelings told you he should not get death, would you[r] conscience require you to misanswer one of the questions?

A. No.

Q. So you would set aside your conscience?

A. Yes, I would.

THE COURT: Let me ask one question. If you find him guilty of capital murder, and you are convinced under all of the evidence that the truthful and proper answer to those three questions is yes -- let's say that there is no question in your mind about it, that the proper answer to the questions is yes, and we know that answering yes means that he will die in the electric chair. Let's assume that. Let's say on the other hand, that you have a personal feeling that regardless of all of this that he just for one reason or another should not die because of this crime.

Now, would you go ahead and answer those questions yes where the evidence to your way of thinking called for the answer yes under those circumstances, or on the other hand, would your feeling that he just shouldn't have death, prevent you from answering a question yes?

MS. McDONALD: I would answer the question yes if circumstances indicated they would be answered yes.

THE COURT: Even though you yourself felt he shouldn't have the death penalty?

MS. McDONALD: Yes, I would, even though I don't believe in it. I'm against capital punishment, but if it was proved to me that it was necessary. If I could answer the questions yes, I would answer them yes.

T. 4542-44.

Q. [By the prosecutor]:... Are you saying that you don't disagree with the legislature and that you are prepared to set aside your personal feelings?

A. Yes, I am. If I was on a jury, I don't know how I could do anything else.

T. 4545.

Q. [By the prosecutor]:... could you set aside your feelings?

A. I could.

Ibid.

The prosecutor then came back to the §12.31 (b) oath, and asked Ms. McDonald whether she could give her assurance that she would not be affected in her deliberations by the prospect of the death penalty. She responded that she didn't know, that she had reservations about her ability to take

such an oath, and that she did not want to take the oath. T. 4550-51.

Upon questioning by defense counsel, Ms. McDonald repeated that she could vote for the death penalty, T. 4553, but that she could not take the oath, T. 4554-57. She stated:

... I can't take that oath and be honest about it. I can take an oath and do what I want to do. I can't take an oath and tell y'all that I'm going to knock out the whole fact that the death penalty is involved in it, because I don't know when I get there. I don't know about the facts or anything. The facts may prove that I could do it, and I would do it and vote for the death penalty.

Q. [By defense counsel] To keep an open mind , that's all we are really asking you to do.

A. You're asking me to take an oath, and I can't take an oath.

T. 4559-60.

My feelings could affect the way that I answer the questions. My feelings could answer the way that I interpret the evidence, and I don't know what my feelings are going to be.

T. 4566.

... I can't give that oath. I can't give anybody that oath. I can't honestly say that. I could say that I could raise my hand and take the oath, but to get back there, I know that it would affect me.

T. 4568. Ms. McDonald was excused for cause.

Ibid.

SUMMARY OF ARGUMENT

I

In Davis v. Georgia, 429 U.S. 122 (1976), this Court reaffirmed the doctrine of Witherspoon v. Illinois, 391 U.S. 510 (1968), and applied that doctrine to cases tried under Georgia's bifurcated, "guided discretion" capital sentencing system. There is nothing different about Texas' bifurcated, "guided discretion" capital sentencing scheme that should lead the Court to any different result in this case.

This Court has long required that in any criminal case, the jury must represent a fair cross-section of the community. Witherspoon applied this requirement to the sentencing jury in capital trials, in recognition of the obvious fact that jurors' views about capital punishment will inevitably influence their sentencing deliberations. The jury still exercises substantial discretion under today's "guided discretion" capital sentencing systems, and in so doing its capacity to reflect a full cross-section of community attitudes is critical.

This is especially so in Texas. As a matter of State law, the Texas Court of Criminal Appeals

has recognized that where the jury's answers to three sentencing questions control the sentence to be imposed by the judge, the jurors' attitudes toward capital punishment will have to affect their answers to those three questions. As a matter of federal constitutional law, this Court has held that the sentencing jury in Texas does not merely answer three narrow factual questions, but must be accorded broad discretion to consider a wide range of mitigating circumstances. And as a matter of common-sense reality, the prospective jurors in this case knew that their answers to the three questions controlled whether Randall Dale Adams would live or die -- indeed, they were expressly told by the prosecutor and the trial judge -- and recognized that their views about capital punishment would necessarily influence the exercise of their discretion at sentencing.

In this setting, the selection of a jury in a Texas capital case may not constitutionally be skewed in favor of a death sentence by denying the defendant a jury representing a fair cross-section of community attitudes. The States are forbidden from excluding broad categories of persons from jury service, and must establish

through particularized inquiry that constitutionally acceptable grounds for excluding a particular venire member exist in fact. Taylor v. Louisiana, 419 U.S. 522 (1975); Duren v. Missouri, 439 U.S. 357 (1979). Accordingly, prospective jurors may not be excused for cause in a capital case unless it is made "unmistakably clear" (Witherspoon v. Illinois, supra, 391 U.S. at 522 n.21) that in exercising their sentencing discretion they would automatically refuse to impose the death penalty regardless of the facts.

II

The rule of Witherspoon was clearly violated in this case by the exclusion for cause of several prospective jurors. Some of these venire members actually favored capital punishment. Others, although expressing some misgivings about either the death penalty in general or their ability to impose it in a specific case, were not shown to be against capital punishment to the extent required for exclusion under Witherspoon. All were excluded merely because they could not swear that the prospect of the death penalty would not "affect" their deliberations, an oath required of them by Texas Penal Code Section 12.31(b).

Persons whose deliberations might be "affected" by the death penalty do not meet the Witherspoon test for exclusion from capital juries. It makes a mockery of Witherspoon to exclude prospective jurors who, although not even opposed to capital punishment, have the sensitivity to be "affected" in their deliberations by the unique penalty at stake. As to the other venire members excluded, it is obvious that persons with "conscientious or religious scruples" against the death penalty (Witherspoon v. Illinois, supra, 391 U.S. at 522) will be "affected" by that belief in their sentencing deliberations. But Witherspoon requires that such affectation amount to an unambiguous and unyielding refusal to vote for the death penalty regardless of the facts, and that simply was not shown in this case.

Witherspoon expressly prohibits the states from employing any broader test for exclusion than the test set forth in Witherspoon itself. 391 U.S. at 522 n.21. Yet that is precisely what Texas did in this case. Texas excluded from jury service the very sort of venire members whose exclusion is forbidden by Witherspoon. Accordingly, the sentence of death imposed upon Randall Dale Adams cannot stand.

ARGUMENT

I

THE DOCTRINE OF WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968), IS FULLY APPLICABLE TO THE BIFURCATED PROCEDURE EMPLOYED BY TEXAS IN CAPITAL CASES

In Davis v. Georgia, 429 U.S. 122 (1976), this Court explicitly reaffirmed the doctrine of Witherspoon v. Illinois, 391 U.S. 510 (1968):

> Unless a venireman is "irrevocably committed before the trial has begun to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings" (391 U.S. at 522 n.21), he cannot be excluded; if a venireman is improperly excluded even though not so committed, any subsequently imposed death penalty cannot stand.

429 U.S. at 123.

Necessary to the holding in Davis was the conclusion, unchallenged by the dissenting opinion, that the Witherspoon doctrine applies to trials conducted under Georgia's bifurcated, "guided discretion" system of capital sentencing approved by the Court in Gregg v. Georgia, 428 U.S. 153 (1976). Thus, the question before the Court in the present case can only be whether there is anything different about Texas' version of bifurcated, "guided discretion" capital sentencing that should lead to a different result than the one reached so recently in Davis. We

submit that plainly there is not. Accordingly the Witherspoon doctrine is wholly applicable to the capital sentencing system of the State of Texas.

The premise of Witherspoon is of vital significance in any system designed to determine whether a capital defendant shall live or be put to death: the State may not, by sweeping from the jury all persons expressing "general objections to the death penalty or ... conscientious or religious scruples against its infliction" (391 U.S. at 522), produce a sentencing tribunal so unrepresentative of a cross-section of the community that it is "uncommonly willing to condemn a man to die," id. at 521. Such an unrepresentative sentencing body is nothing more than a "tribunal organized to return a verdict of death" (id. at 521-22), a "hanging jury" (id. at 523), a jury whose composition "stack[s] the deck" (ibid.) against a man on trial for his life.

It is no innovation of Witherspoon, but merely an application of a long-acknowledged command of Due Process and Equal Protection, as well as of the Sixth Amendment, that whenever a jury is employed to determine issues in any criminal case it must be a fair and impartial jury in the sense

of being fairly reflective of the community from which it is drawn. See Smith v. Texas, 311 U.S. 128, 130 (1940); Carter v. Jury Commission, 396 U.S. 320, 330 (1970). A major function of this requirement is to assure the "application of the common sense of the community to the facts," Ballew v. Georgia, 435 U.S. 223, 232 (1978) and to guarantee that the "common sense judgment of a jury" upon the issues, Duncan v. Louisiana, 391 U.S. 145, 156 (1968), is a judgment reflective of the whole community and not merely of one subgroup.[4/]

Witherspoon applied this settled constitutional requirement to the sentencing function of juries in capital cases because, in deciding whether to sentence a defendant to die, "a juror's general views about capital punishment play an inevitable role," 391 U.S. at 519. One of the

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4/ This Court's decision in Duncan, applying the strictures of the Sixth Amendment to the States, came only two weeks after Witherspoon. Although Witherspoon was technically decided solely under the Due Process Clause of the Fourteenth Amendment, it envisaged and indeed is thoroughly reflective of this Court's subsequent decisions demanding a truly representative jury as a requirement of the Sixth Amendment. See, e.g., Taylor v. Louisiana, 419 U.S. 522 (1975); Ballew v. Georgia, supra; Duren v. Missouri, 439 U.S. 357 (1979).

most important functions of the jury in a capital case tried under bifurcated, "guided discretion" procedures, no less than under their predecessors, is "'to maintain a link between contemporary values and the penal system.'" Gregg v. Georgia, supra, 428 U.S. at 181 (plurality opinion), quoting Witherspoon v. Illinois, supra, 391 U.S. at 519 n.15. See also Woodson v. North Carolina, 428 U.S. 280, 288 & n.13 (1976) (plurality opinion). By insuring selection of a jury that is truly representative of the community, Witherspoon forbids the breaking of this link, which in turn guarantees that the capital sentencing process will be genuinely reflective of "evolving standards of procedural fairness in a civilized society." Gardner v. Florida, 430 U.S. 349, 357 & n.7 (1977) (plurality opinion).[2/]

5/ See Taylor v. Louisiana, 419 U.S. 522, 530-31 (1975):

> We accept the fair cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to

[footnote 5/ continues on next page]

Although the "guided discretion" models for capital sentencing approved by the Court in Gregg and companion cases delimit the broader discretion accorded an Illinois jury at the time

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5/ continued

> guard against the exercise of arbitrary power - to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge.... This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concepts of jury trial. "Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case.... The broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility."

of Witherspoon, the Court recognized in Gregg that under such models "some jury discretion still exists" (428 U.S. at 198)(plurality opinion), and that the jury is still permitted "to dispense mercy on the basis of factors too intangible to write into a statute." Id. at 222 (concurring opinion of Mr. Justice White, joined by the Chief Justice and Mr. Justice Rehnquist).6/ Similarly, the Court noted that in Florida the sentencing factors hardly have "numerical weights assigned to them," Proffitt v. Florida, 428 U.S. 242, 258 (1976)(plurality opinion), and that the statutory aggravating and mitigating circumstances of that State "are not susceptible of mechanical application," id. at 260 (concurring opinion of Mr. Justice White, joined by the Chief Justice and

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6/ Were the states constitutionally entitled to impose a sentence of death mandatorily upon all persons convicted of a given offense, it might be argued that the Constitution need not prevent those states that leave capital sentencing to the jury from "delegating the penalty decision to a group who will impose the death penalty more often than would a group differently chosen." Witherspoon v. Illinois, supra, 391 U.S. at 541 (dissenting opinion of Mr. Justice White). However, this Court has now held that mandatory death sentences are unconstitutional under the Eighth and Fourteenth Amendments. Woodson v. North Carolina, supra, 428 U.S. 280 (1976); Stanislaus Roberts v. Louisiana, 428 U.S. 325 (1976); Harry Roberts v. Louisiana, 431 U.S. 633 (1977).

Mr. Justice Rehnquist).[7] Accordingly, this Court's application of Witherspoon to "guided discretion" capital sentencing systems in Davis v. Georgia, supra, simply recognizes the obvious fact that under those systems a jury's capacity to reflect a full cross-section of community attitudes continues to play a critical role in determining whether "death is the appropriate punishment in a specific case." Woodson v. North Carolina, supra, 428 U.S. at 305 (plurality opinion).[8]

The same perception applies with full force to the capital sentencing scheme of the State of

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7/ Although the jury's role in sentencing in Florida capital cases is advisory, the trial judge may not overrule a jury recommendation of mercy unless "'the facts suggesting a sentence of death ... [are] so clear and convincing that virtually no reasonable person could differ.'" Proffitt v. Florida, supra, 428 U.S. at 249.

8/ As we shall demonstrate in Point II, infra, even the concerns voiced by the dissenting opinion in Davis are inapplicable to this case. Here, not one but several prospective jurors were excluded in violation of Witherspoon; the questioning of those venire members was not truncated but rather averages 40 transcript pages apiece; and the number of peremptory strikes left to the prosecutor at the conclusion of the jury selection was insufficient to strike all of the prospective jurors unconstitutionally removed for cause.

Texas. As a matter of State law, the Texas Court of Criminal Appeals has recognized that while the Texas statute requires the jury

> ... only to answer questions while the judge actually assesses the punishment based on such answers, the fact remains that the jury will know that their answers will determine whether the defendant is to be punished by death or by life imprisonment. To say that the jury's answers would not be affected by their attitude toward the death penalty as a punishment for crime simply because they will not bring forth the ultimate verdict would be to disregard the obvious. We will not engage in such tenuous reasoning.

Hovila v. State, 532 S.W.2d 293, 294 (Tex. Crim. App. 1975). Clearly, a jury aware that its answers to three special issues automatically dictate whether the judge will impose a life or a death sentence[9] cannot escape being influenced by its attitudes toward the death penalty. If those attitudes did not affect its performance of its sentencing tasks, then the practice of death-qualification itself would be an unnecessary and wholly unjustified depletion of the jury pool -- an invasion of the cross-sectional character of the jury for no purpose whatsoever, and hence patently unconstitutional.

9/ Tex. Code Crim. Pro. Art. 37.071(e).

Furthermore, the jury in a Texas capital case does much more than answer three narrow factual questions. Its deliberations upon those questions must be permitted to encompass "whatever evidence of mitigating circumstances the defense can bring before it." Jurek v. Texas, 428 U.S. 262, 273 (1976)(plurality opinion); id. at 272, 276. The jury "must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." Id. at 271. Were the inquiry at sentencing any less broad, the Texas statute would be invalid under this Court's determination in Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion), that the jury may not be precluded from considering in mitigation "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Thus, not only does Texas law recognize that the jury's function at the penalty phase involves far more than answering three simple questions of fact,[10/] but under the Eighth

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10/ Hovila v. State, supra; see also Jurek v. State, 522 S.W.2d 934, 939-40 (Tex. Crim. App. 1975).

and Fourteenth Amendments the jury's role must involve far more.

If this were not sufficiently obvious as a matter of state law and federal constitutional law, it is clearly illustrated by the jury selection process in this very case. The excluded venire members, told that they would have to answer such subjective questions as "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society,"[11/] did not fail to see that their answers would inevitably involve judgment, intuition, and hence attitude as much or more than the finding of some simple fact. See e.g., Mahon at T.70. ("I could be influenced and I think most anyone could be"); McDonald at T. 4529 ("I think anyone's feelings would [be affected]"); Jenson at T. 367-70 ("Well, I think it probably would [affect my deliberations] because afterall, you're talking about a man's life here. You definitely don't want to take it lightly." "... I'm just human like everybody else.... I think it probably will effect anybody's." "I

11/ Tex. Code Crim. Pro. Art. 37.071 (b)(2).

don't know of anybody it couldn't [affect]...." "I don't believe anybody could [not be affected] because you might as well get a computer to sit on the jury.").[12/]

Additionally, the prosecutor in this case explicitly informed the venire members that their answers to the three special issues would control the life-or-death sentence subsequently imposed by the judge. Thus, the prospective jurors knew that they would not merely be answering three questions "yes" or "no;" they would be deciding whether Randall Dale Adams lived or died. See Mahon, T. 54, 55, 60; Jenson, T. 357-58; Ferguson, T. 618; Coyle, T. 1029, 1035; White, T. 1533-34, 1535; Williams, T. 2589-90; Andrews, T. 2699; Giuffrida, T. 4454; Riddle, T. 4931; McDonald, T. 4524. In many instances, this stark reality was reiterated to the venire members by the trial

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12/ In the experience of amicus, such responses are by no means atypical. See, e.g., Hovila v. State, 562 S.W.2d 243, 246 (Tex. Crim. App. 1978), in which prospective juror Glass stated that particularly with regard to the "dangerousness" question, "judging something that would take the life of a man would have to affect" his deliberations.

the trial judge. See Mahon, T. 56; Coyle, T. 1032, 1033; White, T. 1540, 1541, 1543; Williams, T. 2594-95, 2596, 2597, 2598; Andrews, T. 2702; McDonald, T. 4543.

In this setting, Texas' selection of a jury to decide the question of life or death may not constitutionally be skewed in favor of death. It would be so skewed if Texas were permitted to excuse prospective jurors for cause without meeting Witherspoon's requirement that a venire member's unwillingness to impose the death sentence regardless of the facts must be made "unmistakably clear" before he or she may be excluded from the jury. Witherspoon v. Illinois, supra, 391 U.S. at 522 n.21 (1968); Boulden v. Holman, 394 U.S. 478, 482 (1969); Maxwell v. Bishop, 398 U.S. 262, 265 (1970); Davis v. Georgia, supra, 429 U.S. at 123 (1976). That requirement, like the substantive standard of Witherspoon, is firmly grounded in this Court's decisions under the Sixth and Fourteenth Amendments. For it is settled that where an exclusionary practice dilutes the cross-sectional character of the jury, that practice must be fine-tuned to its justification; and

neither approximate rules of thumb nor broad exclusions without particularized inquiry are permitted. Taylor v. Louisiana, 419 U.S. 522, 534-35 (1975); Duren v. Missouri, 439 U.S. 357, 369-70 (1979). As the Court declared in Duren, "the constitutional guarantee to a jury drawn from a fair cross-section of the community requires that the States exercise proper caution in exempting broad categories of persons from jury service." Id. at 370.

Here, the only rationale or justification that Texas can conceivably offer for exclusion is a supposed "inability to follow the law and instructions of the trial judge," Lockett v. Ohio, supra, 438 U.S. at 597 (1978), because of the prospective juror's views regarding capital punishment. But that is the identical justification which was asserted for death-qualifying the jury in Witherspoon (391 U.S. at 518-19) -- a justification which the Court did not disallow as a matter of law (id. at 522-23 n.21) but did insist as a matter of fact must be made "unmistakably clear" (ibid.) and "unambiguously" stated by a prospective juror on voir dire examination

(id. at 516 n.9) before the asserted justification could constitutionally support an exclusion for cause. See also Boulden v. Holman, supra, 394 U.S. at 483-84. There is no reason why the same justification for the same exclusion should be subject to a different constitutional rule in Texas than in Illinois, when the purpose of the rule -- no less applicable here than there -- is to demand that the existence of the justification must be factually established with requisite clarity. Although each State may be entitled to exclude prospective jurors who cannot follow its law, neither is entitled to excuse any verire member for this reason unless the applicability of the reason to the particular venireman is established by an unambiguous showing "that that is his position" in fact, 391 U.S. at 516 n.9.

Texas, like Illinois, may require a jury that is "simply 'neutral' with respect to penalty." Id. at 520. But it has no more claim than Illinois to go further and to assert immunity from constitutional restraints when it has "crossed the line of neutrality," ibid. Yet that is precisely what Texas did in this case, as we shall next show.

II

THE RULE OF WITHERSPOON V. ILLINOIS WAS VIOLATED BY THE EXCLUSION FOR CAUSE OF SEVERAL PROSPECTIVE JURORS WHO, ALTHOUGH EITHER IN FAVOR OF CAPITAL PUNISHMENT OR NOT OPPOSED TO CAPITAL PUNISHMENT TO THE EXTENT REQUIRED FOR EXCLUSION UNDER WITHERSPOON, COULD NOT SWEAR THAT THE POSSIBLE IMPOSITION OF THE DEATH PENALTY IN THIS CASE WOULD NOT "AFFECT" THEIR DELIBERATIONS

At petitioner's trial, several venire members were excluded for cause in clear violation of Witherspoon standards. Some of these prospective jurors actually favored the death penalty. Others, although generally opposed to capital punishment, were not so fixed in their opposition as to justify their exclusion under Witherspoon. However, all of those excluded felt that in deciding questions which would determine petitioner's fate, they would necessarily be "affected" in their deliberations by the prospect of the death penalty. They were thereupon stricken pursuant to Section 12.31(b) of the Texas Penal Code, which requires the exclusion for cause of every prospective juror in a capital case who is unable to swear that "the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact."

Persons whose deliberations might be "affected" by the prospect of the death penalty simply do not meet Witherspoon's constitutional test for exclusion for cause. That test prohibits the exclusion of prospective jurors who do not make it

> unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.

391 U.S. at 522 n.21 (emphasis in original). As a panel of the Fifth Circuit recently recognized in Burns v. Estelle, 592 F.2d 1297, 1301 (5th Cir. 1979), rehearing en banc granted, 598 F.2d 1016 (5th Cir. 1979),[13/] the fact that a prospective juror might be "affected" by the prospect of the death penalty [Tex. Penal Code §12.31 (b)] is not a lawful ground for exclusion under this constitutional test because:

> [To be "affected"] spans the range of possible effects ... from a mere heightening of the seriousness with which [one] might approach her deliberations as a juror, through

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13/ Burns was argued before the Fifth Circuit en banc on January 8, 1980.

> conscientious and moral dilemmas foreseen, to an utter refusal to deliberate rationally at all. More than this [is] required for ... disqualification....

Burns v. Estelle, supra, 592 F.2d at 1301.

At least three prospective jurors in petitioner's case, Mrs. Francis Mahon, Mr. Forrest J. Jenson, and Mrs. Nelda Coyle, were not opposed to capital punishment and were perfectly capable of imposing it in this type of case. Mahon, T. 33-37, 49, 60-64; Jenson, T. 351, 354, 361-64; Coyle, T. 1023-26. They were nonetheless excluded for cause merely because they could not swear, as required by Tex. Penal Code §12.31 (b), that their deliberations would not be "affected" by the prospect of the death penalty. Mahon, T. 67-71; Jenson, T. 367-71; Coyle, T. 1030, 1035, 1038, 1048-55, 1064-65, 1067, 1070.

At no time did these three prospective jurors state, as required by Witherspoon, that they would automatically vote against capital punishment without regard to the facts, or that they could not render an impartial decision as to guilt or innocence. They simply said that in weighing petitioner's fate, the potentially lethal consequences of their deliberations would naturally enter into their thinking. As Mr. Jenson stated:

> Well, I think it probably would [affect my deliberations] because afterall, you're talking about a man's life here. You definitely don't want to take it lightly.

T. 367.

The ground upon which venire members Mahon, Jenson and Coyle were excluded for cause makes a mockery of Witherspoon. The Illinois practice declared unconstitutional in Witherspoon at least required some genuine opposition to capital punishment. But here, Texas has permitted the prosecution to exclude for cause all venire members having even the slightest qualms about the death penalty. Obviously, to strip the jury of all individuals who, although not opposed to capital punishment, have the discernment to be affected in their sentencing deliberations by the nature of the unique penalty at stake, produces "a jury uncommonly willing to condemn a man to die." Witherspoon v. Illinois, supra, 391 U.S. at 521.

Several other prospective jurors were also excluded in this case solely because they could not take the Section 12.31(b) oath. Although these venire members voiced some misgivings about either capital punishment in general or their ability to impose it in a specific case, none clearly stated that he or she would automatically

vote against the death penalty without regard to the facts. See e.g., Mrs. Lloyd White, T. 1525-66; Mr. Curtis Williams, T. 2571-2604; Mrs. Bobbie Andrews, T. 2692-2730; and Ms. Penny McDonald, T. 4492-4571.[14/] They were stricken not because their qualms about the death penalty were so unambiguously clear and unyielding as to meet the Witherspoon test for exclusion, but merely because they were human enough to be "affected" in their deliberations by the realization that life was at stake in the controversy.

It is difficult to imagine any thoughtful juror, faced with deciding whether a defendant will live or die, not being so affected. "[W]hat candid and responsible citizen would not admit as much, could truthfully swear the proposition to be one of no concern whatever?" Burns v. Estelle, supra, 527 F.2d at 1301. And surely any prospective juror having misgivings about capital punishment -- including the sort of "general objections to the death penalty or ... conscientious or religious scruples against its infliction" which are not constitutionally sufficient grounds for

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14/ The voir dire examination of these prospective jurors is set forth in detail at pp. 12-27, supra.

exclusion under Witherspoon, 391 U.S. at 522[15/] -- is virtually certain to be so affected.[16/] As Judge Roberts of the Texas Court of Criminal Appeals stated in his dissent in Shippy v. State, 556 S.W.2d 246, 262 (Tex. Crim. App. 1977):

> ...Witherspoon holds that a juror's exclusion cannot be predicated upon his general objection to the death penalty or his conscientious and religious scruples against its infliction. It is readily apparent that a person who generally objects to the death penalty because of conscientious and religious scruples against its infliction will

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15/ See also Boulden v. Holman, supra, 394 U.S. at 482-84 (1969); Maxwell v. Bishop, supra, 398 U.S. at 265 (1970).

16/ In most instances, the invocation of the §12.31(b) oath in this case was expressly aimed at the jurors' sentencing deliberations. See, e.g., Mahon, T. 70; Jenson, T. 367-69; White, T. 1544; Williams, T. 2598-99, 2603; McDonald, T. 4530, 4566. In other instances the prosecutor's questioning broadly applied the §12.31(b) oath to all deliberations, thereby necessarily encompassing deliberations at the penalty trial as well as those at the trial of guilt or innocence. And the Texas Court of Criminal Appeals has repeatedly construed the oath as applying to sentencing deliberations as well as to deliberations on guilt. See Burns v. State, 556 S.W.2d 270, 275-76

[footnote 16/ continues on next page]

> have his determination of fact affected by such belief. But if such "affectation" does not amount to an unambiguous and irrevocable commitment to vote against the death penalty in all cases, such individual cannot be constitutionally challenged for cause under Witherspoon.

A majority of the Texas Court of Criminal Appeals has repeatedly held that the Section 12.31(b) oath is constitutionally valid. See, e.g., Burns v. State, 556 S.W.2d 270, 276 (Tex. Crim. App. 1977); Anderson Hughes v. State, 562 S.W.2d 857, 860-61 (Tex. Crim. App. 1978). That

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16/ continued

(Tex. Crim. App. 1977) and cases cited therein; Anderson Hughes v. State, 562 S.W.2d 857, 860-61 (Tex. Crim. App. 1978); Bell v. State, 582 S.W.2d 800, 806 (Tex. Crim. App. 1979). Indeed, it so held in this very case. Adams v. State, 577 S.W.2d 717, 728 (Tex. Crim. App. 1979).

In any event, the §12.31(b) oath is invalid even if applied solely to deliberations at the trial of guilt or innocence. For to be "affected" in one's deliberations by no means renders it "unmistakably clear" that the juror is incapable of "making an impartial decision" as to guilt. Witherspoon v. Illinois, supra, 391 U.S. at 522 n.21. As a panel of the Fifth Circuit noted in Burns v. Estelle, supra, 592 F.2d at 1301, such "affectation" could amount to no more than a determination to study the evidence with great care, to be thorough and meticulous, to display a "heightening of the seriousness with which [a juror] might approach her deliberations."

court believes that the oath may be viewed as a test separate and apart from Witherspoon, and that venire members who are clearly qualified under Witherspoon may nonetheless be disqualified under the oath. Anderson Hughes v. State, supra.[17/] But Witherspoon did not simply establish one form of test for qualifying or disqualifying death-scrupled veniremen in capital cases. It explicitly prohibited the States from employing any more extensive grounds than the Witherspoon test for excusing veniremen for cause on account of their attitudes toward the death penalty:

> If the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out....

17/ See also Burks v. State, 583 S.W.2d 389, 393-94 (Tex. Crim. App. 1979); Bodde v. State, 568 S.W.2d 344, 348 (Tex. Crim. App. 1978); Chambers v. State, 568 S.W.2d 313, 319-20 (Tex. Crim. App. 1978); Billy George Hughes, Jr. v. State, 563 S.W.2d 581, 583 (Tex. Crim. App. 1978); Hovila v. State, supra, 562 S.W.2d 243, 248 (Tex. Crim. App. 1978); Burns v. State, supra, 556 S.W.2d 270, 275-76 (Tex. Crim. App. 1977); Moore v. State, 542 S.W.2d 664, 672 (Tex. Crim. App. 1976).

391 U.S. at 522 n.21.[18/]

Under this Court's decision in Davis v. Georgia, supra, 429 U.S. 122 (1976), the unconstitutional exclusion for cause of even a single prospective juror in a capital case requires reversal of the death sentence. See also Marion v. Beto, 434 F.2d 29 (5th Cir. 1970). As the Fifth Circuit stated in Marion:

18/ Respondent may argue that the prosecution's failure to use four of its peremptory challenges in this case renders the Witherspoon error harmless. However, this Court has long held that speculation as to what a prosecutor might possibly have done with his unused peremptory challenges is insufficient to overcome Witherspoon error. In Davis v. Georgia, supra, 429 U.S. 122 (1976), a majority of the Court rejected the dissent's contention (id. at 124) that the presence of an unused peremptory might render the Witherspoon error harmless. And in a plethora of cases prior to Davis, the Court similarly reversed state court decisions that had expressly relied upon unused peremptories to avoid the invalidation of death sentences under Witherspoon. See Whan v. Texas, 438 S.W.2d 918 (Tex. Crim. App. 1969) (14 unused peremptories), rev'd, 403 U.S. 946 (1971); Speck v. Illinois, 41 Ill. 2d 177, 242 N.E.2d 208 (1968) (79 unused peremptories), rev'd, 403 U.S. 946 (1971); Bernette v. Illinois and Tajra v. Illinois, 45 Ill. 2d 227, 258 N.E.2d 793 (1970) (33 unused peremptories), rev'd, 403 U.S. 947 (1971); Mathis v. New Jersey, 52 N.J. 238, 245 A.2d 20 (1968) (5 or 6 unused peremptories), rev'd, 403 U.S. 946 (1971); Wigglesworth v. Ohio, 18 Ohio St. 2d 171, 248 N.E.2d 607 (1969) (7 unused peremptories), rev'd, 403 U.S. 947 (1971).

[footnote 18/ continues on next page]

> The magnitude of a decision to take a human life is probably unparalleled in the human experience of a member of a civilized society . . . . Given the weightiness of the subject involved it really does not follow that the improper exclusion of a relatively small number of the total veniremen examined does not prejudice the defendant's rights to an impartial cross-section of the community.

18/ continued

Obviously, there are many factors that go into a trial attorney's decision to use a peremptory strike. Among these are the number of strikes already used, the number remaining, the number of jurors yet to be chosen, an assessment of the likelihood of having to use several additional strikes on venire members yet to come (based upon prior investigation, scrutiny of questionnaires answered by the panel, personal observation, etc.), and the likelihood of the trial judge granting additional peremptories. It would be sheer conjecture to assume that a prosecutor will automatically exercise a peremptory challenge every single time the trial judge denies his request to exclude a venire member for cause. Surely, in a death case, such surmise is insufficient to render constitutional error harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967).

In any event, the issue does not arise in this case. Use of the four peremptory challenges allegedly left to the prosecutor (Respondent's Brief in Opposition to Certiorari, p. 8) would have been insufficent to strike the numerous venire members who were excused for cause for failure to subscribe to the §12.31(b) oath even though not subject to exclusion under Witherspoon.

> Where, as here, unanimity of decision is required to impose the death sentence, the stark reality is that one improperly excluded juror may mean the difference between life or death for a defendant.

Id. at 32.

In this case, not one but several venire members were unconstitutionally excluded. Indeed, the record is replete with disregard for this Court's decision in Witherspoon. As in Witherspoon, the jury selection process here "stacked the deck" (391 U.S. at 523) against Randall Dale Adams. Accordingly, the judgment below, insofar as it leaves undisturbed the sentence of death, must be reversed.19/

19/ Under Texas law, the State may not retry petitioner solely on the issue of punishment. See Ellison v. State, 432 S.W. 2d 955 (Tex. Crim. App. 1968); Grider v. State, 468 S.W.2d 393 (Tex. Crim. App. 1971); Ocker v. State, 477 S.W.2d 288, 291 (Tex. Crim. App. 1972). However, if the prosecutor is unable to retry the entire case, Texas law permits the Governor to simply commute the sentence to life imprisonment. See Whan v. State, 485 S.W.2d 275 (Tex. Crim. App. 1972); Stanley v. State, 490 S.W.2d 828, 830 (Tex. Crim. App. 1972).

[footnote 19/ continues on next page]

CONCLUSION

This Court should reverse the judgment of the Texas Court of Criminal Appeals in this case

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19/ continued

Although irrelevant to the decision of this case, it is perhaps worth noting that in our experience the §12.31(b) oath has not been invoked by all Texas prosecutors, and its invalidation by this Court will by no means result in reversal of all or even most of the 117 death sentences presently in force in Texas. To be sure, the oath is at least arguably at issue in approximately half of the 52 death cases affirmed by the Texas Court of Criminal Appeals to date. But Texas prosecutors have been on notice for several years that reliance upon the oath was fraught with danger [see, e.g., Shippy v. State, supra, 556 S.W.2d 246, 257-63 (Tex. Crim. App. 1977) (Roberts, J. dissenting); see also Crump, Capital Murder: The Issues in Texas, 14 Houston L. Rev. 531, 543 & n.69 (1977); Comment, Death Prone Jurors: The Disintegration of the Witherspoon Rule in Texas, 9 St. Mary's L. J. 288 (1977)], and even before that the district attorneys of some counties [e.g., Tarrant (Ft. Worth), Travis (Austin) and Collin (suburban Dallas)] had sought to avoid its use. We have seen many records that are free of §12.31(b) error.

insofar as it leaves the sentence of death undisturbed.

Respectfully submitted,

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